AN EPITOME

OF

LEADING COMMON LAW CASES.

SOLICITORS' FINAL (PASS & HONOURS) AND INTERMEDIATE EXAMINATIONS AND BAR FINAL.

Mr. Charles Thwaites continues to prepare Students for these Examinations, with great success, both in class and privately, and through the post.

A four months' course of reading for the Solicitors' Final Examination is recommended, and a longer period is often advisable, particularly when the Student is specially desirous of obtaining Honours, or has neglected his reading. A three months' course of reading is recommended for the Bar Final, and for the Solicitors' Intermediate. Dates of Classes, particulars as to Fees, &c., are from time to time advertised in *The Law Students' Journal* (monthly); and any further information can be obtained from Mr. Charles Thwaites, at his Chambers, 22 Chancery Lane, London.

AN EPITOME

OF

LEADING COMMON LAW CASES

WITH SOME SHORT NOTES THEREON:

CHIEFLY INTENDED AS

A Guide to "Smith's Leading Cases."

BY

JOHN INDERMAUR,

SOLICITOR (FIRST PRIZEMAN, MICHAELMAS TERM, 1872); AUTHOR OF "PRINCIPLES OF THE COMMON LAW," "MANUAL OF PRACTICE," "MANUAL OF THE PRINCIPLES OF EQUITY," ETC.

NINTH EDITION

BY

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PREFACE TO NINTH EDITION.

THIS work made its first appearance in 1873, and has since then passed through Eight Editions. These were all prepared by Mr. John Indermaur. At his request I am responsible for this, the ninth Edition.

The Eleventh Edition of "Smith's Leading Cases" has recently been published, and my task was facilitated by the publishers of that work kindly placing an early copy at my disposal.

I have thoroughly revised the entire work. All the references to cases have been checked. The cases reported and statutes passed since the Eighth Edition was issued in May 1896 have been noted up as appeared needful. The number and order of the cases epitomised are left unaltered, but the date of each leading case is now inserted. I have tried to keep down the size of

the book as far as possible without sacrificing efficiency. Over a hundred fresh cases appear in the notes.

This book was first issued as a guide and companion to "Smith's Leading Cases," and I trust this Edition may find the same approval from its readers as did its predecessors.

CHARLES THWAITES.

22 CHANCERY LANE.

PREFACE TO FIRST EDITION.

THE Compiler of this small volume while reading for his Final Examination, devoted some time to the study of Leading Cases, and it long ago occurred to him that —many articled clerks not having sufficient time to fully peruse the large volumes of "Leading Cases"—a short Epitome, giving those decisions most important to be read and remembered, would be very useful to them. Besides this, he has long thought that an Epitome might be equally, if not more, useful to those who attentively read the large volumes, for they can, after having done so, speedily run through a small manual like the present, and impress the chief decisions on their memories. This Epitome professes to nothing particularly original, for it is indeed but an abridgment of the chief decisions in "Smith's Leading Cases," with some few additional ones, and some short notes bearing directly on the different decisions. The facts of the different cases are given when they could be shortly stated, and when they seemed to be of a

character likely to serve to impress the decision on the student's memory.

It is sincerely hoped that this Epitome will be found useful for the purpose for which it is intended, viz., as a help to the reading of "Smith's Leading Cases."

J. I.

February 1873.

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Note.—The Edition of "Smith's Leading Cases" to which reference is made in this Epitome is the 11th, published in 1903.

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A Guide to "Smith's Leading Cases."

TWYNE'S CASE.

(*S. L. C., Vol. I. p.* 1.)

(1583—3 *Coke*, 80.)

INFORMATION against Twyne, for making and publishing a fraudulent gift of goods. Pierce was indebted to Twyne in £400 and to C. in £200. Pending an action by C. against Pierce, Pierce, being possessed of goods to the value of £300, by deed of gift conveyed them to Twyne in satisfaction of his debt, but Pierce continued in possession of the goods. C. obtained judgment against Pierce, and issued a *fi. fa.*, and Twyne resisted execution.

Resolved:—That the gift was fraudulent within 13 Eliz. c. 5, on the following grounds:—

1. The gift was perfectly general, it included all Pierce had.

2. The donor continued in possession, and thereby could get credit as the ostensible owner.

3. It was made in secret.

4. It was made pending the writ.

5. There was a trust between the parties, and fraud is always clothed with a trust.

6. The deed contained an allegation that the gift was honestly and truly made, which was an inconsistent clause.

Notes.—The law declared by 13 Eliz. c. 5 is, that all gifts and conveyances, either of chattels or of land, made for the purpose of defeating or delaying creditors, are void against them, unless made upon a valuable consideration and *bonâ fide* to some person without notice of the fraud. Persons who are creditors at the time of the gift or conveyance can always upset it, if it does in fact defeat or delay them (*Freeman* v. *Pope*, 39 L. J. Ch. 689); but those who are only claimants as distinct from creditors at the time must prove intent to defraud them (*Ex parte Mercer, re Wise*, 17 Q. B. D. 290). Subsequent creditors cannot upset the transaction merely because it prevents their being paid (*Re Lane Fox*, 1900, 2 Q. B. 508; 69 L. J. Q. B. 722; 82 L. T. 176); but must show either (1) Express intent to defraud them (*Spirett* v. *Willows*, 34 L. J. Ch. 367; *Re Holland*, 71 L. J. Ch. 518); or (2) That their money has gone to pay off creditors who were such before the date of the settlement, for here they are allowed to stand in the shoes of such antecedent creditors (*Freeman* v. *Pope*, L. R. 5 Ch. 538; 39 L. J. Ch. 689); or (3) That the settlor made the settlement on the eve of entering upon some enterprise which might result in insolvency (*Mackay* v. *Douglas*, L. R. 14 Eq. 106; 41 L. J. Ch. 539; *Ex parte re Butterworth*, 19 Ch. D. 588; 51 L. J. Ch. 521; see Indermaur's Manual of Equity, 5th ed., 41). Of course, although a conveyance may be fraudulent against creditors

under the statute, yet as between the parties themselves it may be good; and note that though a settlement may be fraudulent and void against creditors under the statute, yet a purchaser for value of any interest, legal or equitable, derived under the settlement, is protected by sect. 5, provided he had no notice of the fraudulent character of the settlement (*Halifax Joint Stock Banking Company* v. *Gledhill* (1891), 1 Ch. 31; 60 L. J. Ch. 181). Twyne's case was not decided on the ground that there was *no* consideration, for the debt was a sufficient consideration, but on the ground that it was not *bonâ fide*. A debtor has a right to prefer one creditor to another, but he must do so openly, for the law will not allow a creditor to make use of his demand to shelter the debtor, and while he leaves him *in statu quo* by forbearing to enforce the assignment, to defeat the other creditors by insisting on it. It may be observed that the enactments contained in 13 Eliz. c. 5, are simply declaratory of the Common Law.

In questions as to voluntary conveyances, it is also necessary to note section 47 of the Bankruptcy Act 1883 (46 & 47 Vict. c. 52). This provides that a voluntary settlement—(1) is void if the settlor becomes bankrupt within two years; and (2) will be void if he becomes bankrupt after two years, but within ten years, unless the parties claiming under such settlement can prove that the settlor was at the time of making it able to pay all his debts without the aid of the property comprised in such settlement, and that the interest of the settlor in such property passed to the trustee thereof on its execution. A gift of money with which to start business is not within this section (*Re Player*, 15 Q. B. D. 682; 54 L. J. Q. B. 553); but a gift of property meant to be preserved is, *e.g.*, shares in a company (*Ex parte Todd*, 19 Q. B. D. 186; *Re Player*, 54 L. J. Q. B. 553), diamonds to a wife (*Re Vansittart*, 1893, 1 Q. B. 181; 62 L. J. Q. B. 277), or furniture (*Re Tankard*, 68 L. J. Q. B. 670). A gift or voluntary settlement under this provision is not void *ab initio*, but is only void from the date when the title of the trustee in bankruptcy accrues (*i.e.*, the first available act of bankruptcy), so that if the gift is pawned (*Re Vansittart*, 1893,

2 Q. B. 377) or if the donee sells to a *bonâ fide* purchaser (*Re Carter and Kenderdine*, 1897, 1 Ch. 776), who takes before the receiving order and without notice of an available act of bankruptcy, the title of the pledgee or purchaser is good against the trustee in bankruptcy (*Sanguinetti* v. *Stuckey's Banking Co.*, 1895, 1 Ch. 176).

By 27 Eliz. c. 4, all voluntary conveyances of *land* were made void against subsequent purchasers for value; but this is not so now, as by the Voluntary Conveyances Act 1893 (56 & 57 Vict. c. 21), it is provided that a voluntary conveyance of land whenever made, if made *bonâ fide* and without fraudulent intent, shall not be defeated by reason of any subsequent purchase for value. This Act does not affect a purchase for value from the voluntary grantor made before the passing of the Act (29 June, 1893).

The setting aside of a settlement as fraudulent and bad under 13 Eliz. c. 5 must not be confused with the provisions as to voluntary settlements contained in the Bankruptcy Act 1883, that being an entirely distinct thing, referring only to bankruptcy, whilst the 13 Eliz. c. 5 is quite irrespective of bankruptcy. The rights of creditors under 13 Eliz. c. 5 are legal rights which are not barred by laches (*Re Maddever*, 27 Ch. D. 520), but where a creditor sues on behalf of himself and all other creditors, an interlocutory injunction can be granted, or an interim receiver appointed to preserve the property until the trial (*Re Mouatt*, 68 L. J. Ch. 390).

A disposition of a man's goods otherwise than by delivery is ordinarily termed a Bill of Sale, an expression very wide in its nature, and including in fact any instrument under which the property in goods passes to another (see *Re Roberts, Evans* v. [illegible], 36 Ch. D. 196; 56 L. J. Ch. 952; *Haydon* v. *Brown*, L. T. 810; *Re Willis, Ex parte Kennedy*, 21 Q. B. D. 384; 57 L. J. Q. B. 634). However, a debenture issued by an incorporated company is not a bill of sale, although it is secured upon the capital, stock, goods, chattels, and effects of the company, and even though secured by a deed of trust (*Re Standard Manufacturing Co., Limited, Ex parte Lowe* (1891),

1 Ch. 627; 60 L. J. Q. B. 292; 45 & 46 Vict. c. 43, s. 17] Bills of Sale are now in various particulars governed by th Bills of Sale Acts, 1878 (41 & 42 Vict. c. 31) and 1882 (45 & 46 Vict. c. 43). But antenuptial settlements, assignments fo the benefit of creditors, transfers of ships, and bills of ladin are excluded from both Acts.

The Act of 1878 governs all bills of sale given otherwis than as security for money, *e.g.*, a purchase of a man's goods or a post-nuptial settlement, whilst the Act of 1882 govern all such instruments given as security for money.

Under the Act of 1878 every absolute bill of sale must b attested by a solicitor of the Supreme Court, and the attestatio must state that before execution its effect has been explained t the grantor by the attesting solicitor, and the consideratio must be truly stated, and an affidavit of due execution must b made, and the bill of sale registered and affidavit filed in th central office of the High Court of Justice within seven days and this registration must be renewed every five years. If th formalities prescribed by this Act are not observed, the effec is not to render the instrument absolutely void, but only t make it bad against execution creditors and trustees i bankruptcy and under assignments for the benefit of creditors as regards goods left in the apparent possession of the grantor (*Davis* v. *Goodman*, 5 C. P. Div. 128; 49 L. J. C. P. 344).

Under the Act of 1882 as to a moneylender's bill of sale, th instrument must adhere strictly to a certain form given in th Act (*Ex parte Stanford, re Barber*, 17 Q. B. D. 259; 55 L. J. Q. B 339; *Thomas* v. *Kelly*, 13 App. Cas. 506; 58 L. J. Q. B. 68) there must be a schedule or inventory to the bill of sale; and it must not be for less than £30. If the foregoing formalities are not observed, then the instrument is void, even as between the parties, and for all purposes, so that no action can even be brought upon any covenant contained therein (*Davies* v. *Rees*, 17 Q. B. D. 408; 55 L. J. Q. B. 363). The moneylender's bill of sale must truly set out the consideration for which it is given, and must be attested by one credible witness, and be registered within seven days, and re-registered every five years; but if

one of these points is not complied with, though the instrument is void in respect of the personal chattels comprised therein, the moneylender can sue the grantor upon the covenants contained in it (*Heseltine* v. *Simmons* (1892), 2 Q. B. 547; L. J. Q. B. 5). (See further hereon Indermaur's Principles of Common Law, 9th ed., 114-122; Indermaur's Conveyancing, 445–449.)

DUMPOR'S CASE.

(*S. L. C., Vol. I. p.* 32.)

(1603—4 *Coke*, 119*b*.)

Decided :—That where there is a covenant not to alien without licence, and that licence is once given, the licence applies to all future acts of a like nature, so that no alienation afterwards, though without licence, is a breach of the covenant.

Notes.—The following was the practical working of the extraordinary doctrine laid down in this case: —A. makes a lease to B., who covenants not to assign without the licence of A. A. grants a licence to B. to assign to C., and afterwards, notwithstanding the covenant, the term can be assigned to any one (*Brummell* v. *Macpherson*, 1807, 14 Ves. 173). The ground of the doctrine was, that every condition of re-entry is entire and indivisible, and the condition, having been waived once, could not be enforced again. So far as regards licences and waivers of conditions in leases this case has ceased to be law. For by the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 1, a licence to do an act which would otherwise create a forfeiture or give a right of re-entry under a condition or power contained in the lease shall (unless otherwise expressed) extend only to the permission actually given, or the actual matter thereby authorised, and shall not prevent forfeiture or re-entry for any subsequent breach of covenant or condition not thereby authorised. This Act did not apply to an *actual* waiver of a breach of a covenant, which under *Dumpor's Case* destroyed the condition of re-entry; but 23 & 24 Vict. c. 38, s. 6, enacts that any actual waiver by a lessor of the benefit of any covenant or condition in the lease taking

place after the passing of that Act (July 23, 1860), shall *not* be deemed to extend to any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear.

If a lessor, with knowledge of a breach of covenant or condition which operates as a forfeiture of the lease, accepts payment of rent which fell due *after* the breach, that operates as a waiver of the forfeiture (*Davenport* v. *The Queen*, 1877, 3 App. Ca. 115); but if there is a continuing breach, the receipt of rent only waives the forfeiture up to that date (*Doe* v. *Jones*, 1856, 5 Ex. 498; *Jacob* v. *Down*, 1900, 2 Ch. 156).

A covenant "not to assign" means a legal assignment by act of the party, and is not broken by a declaration to hold in trust for another (*Gentle* v. *Faulkner*, 1900, 2 Q. B. 267), or by an underlease (*Bryant* v. *Hancock*, 1899, A. C. 442), or an equitable mortgage by deposit (*Doe* v. *Hogg*, 4 D. & R. 226), or probably by a bequest of the lease (see cases quoted, 1 S. L. C. 49).

An assignment by operation of law is no breach of a covenant not to assign, unless such an event is brought about by the fraudulent procurement of the lessee himself. Therefore, if the lessee becomes bankrupt, or the lease is taken in execution, or if the land is taken under statutory powers, there is no breach of such a covenant (1 S. L. C. 48).

SPENCER'S CASE.

(*S. L. C., Vol. I. p.* 55.)

(1583—5 *Coke*, 16.)

This was an action of covenant by the lessors of certain property against the assignees thereof, for not building a wall upon the property as the original lessee had covenanted to do. The principal discussion in the case was as to what covenants would run with the land, and the following were the chief points decided:

1. That where the covenant extends to a thing *in esse* parcel of the demise (*e.g.*, a covenant to repair the demised buildings), the covenant is appurtenant to the thing demised, and binds the assignee without express words, as if the lessee covenants to repair the house demised to him, during the term; but *not* so, if the thing is not in being at the time of the demise (*e.g.*, a covenant to build a wall on the property let).

2. That where the lessee covenants for himself "*and his assigns*," to erect something *upon the thing demised* (*e.g.*, to build a wall or a house), forasmuch as it is to be done upon the land demised, that binds the assignee.

3. But even though the lessee covenant for himself "*and his assigns*," yet if the thing to be done be merely

collateral to the land, and does not in any way touch or concern the thing demised (*e.g.*, to build a house on other land of the lessor), then the assignee cannot be charged.

—This case shows the nature of the covenants which will run with leasehold land.

A covenant is said to run with the land, if either the liability to perform it, or the right to take advantage of it, passes to the assignee of the land. A covenant is said to run with the reversion if either the benefit or the burden of it passes to the assignee of the reversion.

As to leaseholds, the better opinion is that *at common law* covenants did run with the land but did not run with the reversion, so that the assignee of the lessee could both sue and be sued on the covenants in the lease, but the assignee of the lessor could neither sue nor be sued (1 S. L. C. 62).

The rule that covenants did not run with the reversion seems to have proceeded from the rule that, though an estate could be assigned, a contract could not; so that, if a lessee covenanted to keep the buildings in repair, and the lessor sold his interest, he could not assign the benefit of this covenant, and consequently on breach of the covenant the assignee of the lessor could not sue in his own name, but had to get permission from the original lessor to bring an action in his name against the lessee.

This rule was first altered by 32 Henry 8, c. 34, which enacts that the assignee of the reversion on a lease shall have the same rights as the original lessor had—(1) by entry, for non-payment of rent or for doing waste or other forfeiture, and (2) by action only, for non-performance of other conditions, covenants, or agreements in the lease; and that the lessee and his assigns shall have the same remedy against the assignee of the reversion (which was vested in the lessor at the date of the covenant, *Muller* v. *Trafford*, 1901, 1 Ch. 54), on any covenant in the lease as he had against the lessor. The reason

for this Act was that the lands of dissolved monasteries had been vested in the Crown, and often regranted, and it was found that neither the Crown nor its grantees could sue the lessees of the monasteries on the covenants in their leases; so a public statute was passed to remedy the defect. But the Act was construed to extend only to covenants which touch and concern the thing demised and not to collateral covenants (1 S. L. C., 61, 63), and only to leases made by deed (*Smith* v. *Eggington*, L. R. 9 C. P. 145).

This Act only applied to the original reversion. Thus if A., seised in fee, leased to B. for ninety-nine years, and B. underleased to C. for twenty-one years, and A. sold his reversion to D., and D. bought up B.'s lease, D. had no remedies against C. on C.'s covenants in the underlease (*Threr* v. *Barton*, Moore 94), for the merger of B.'s reversion in the fee destroyed its incidents. The Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28, s. 6), partly remedied this defect by providing that, if a lessee surrendered his lease to get a renewal, he should retain his rights against his underlessee. And the Real Property Act, 1845 (8 & 9 Vict. c. 106, s. 9), enacts that if the reversion on any lease is surrendered or merged, the owner of the next vested estate shall be deemed the reversioner and have the lessor's rights against the lessee.

The Conveyancing Act, 1881 (44 & 45 Vict. c. 41), with regard to leases made on or after 1st January, 1882, also contains provisions on this subject which somewhat enlarge the provisions of the above Act of Henry 8. The enactments referred to are as follows:—"Rent reserved by a lease and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed and performed, and every condition of re-entry and other condition therein contained, shall be and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being

recovered, received, enforced, and taken advantage of by the person from time to time entitled (subject to the term) to the income of the whole or any part, as the case may require, of the land leased" (Sect. 10). "The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of the reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled" (Sect. 11). Hence, if a mortgagor in possession makes a lease binding on the mortgagee, and the mortgagee gives notice to the lessee to pay rent to him, the mortgagee thereupon becomes the reversioner, and can sue and be sued on the covenants in the lease (*Wilson* v. *Queen's Club*, 1891, 3 Ch. 522).

The following are illustrations of covenants which run with leasehold land. The following run, whether assigns are named or not—all implied covenants *e.g.*, by the word *demise*; express covenants—for quiet enjoyment, for renewal of the lease, to pay rent and taxes, to put in repair, to keep in repair, to reside on the premises, not to use for certain trades, to insure, to repair and renew tenant's fixtures and machinery fixed to the premises, not to assign or underlet without licence, not to plough up grass land; and a covenant in a lease of a public house not to buy beer from anybody but the lessor (*Cleyy* v. *Hands*, 44 Ch. D., 503; 59 L. J. Ch. 577), even though the lessor dies and his business vests in one person, and the reversion of the lease in another (*White* v. *Southend Hotel Co.*, 1897, 1 Ch. 767; 66 L. J. Ch. 387). The following covenants run if the lessee covenants for himself and his assigns—to build a brick wall, a house, a

conservatory, on the land let. (See Woodfall's Landlord and Tenant, 17th ed., 183–188).

As to covenants running with the land in other cases than those between landlord and tenant. The benefit of covenants made *with* the owner of the land to which they relate passes to each successive transferee of the land to which they relate, provided he be in of the same estate as the original covenantee was; and of this description are the ordinary covenants for title. But the burden of covenants entered into *by* the owner of the land to which they relate, does not run with the land, and such covenants only bind the original covenantor (*Austerberry* v. *Oldham*, 29 Ch. D. 750; 55 L. J. Ch. 633); for if such covenants bound transferees, they would frequently find themselves liable on contracts of which they were ignorant, and which would, had they known of them, have deterred them from purchasing (1 Smith's Leading Cases, 75, 78). Thus a covenant by the owner of ironworks to take lime from A.'s quarry, or by the owner of a house to take coal from a certain pit, or by the owner of a farm to employ a certain blacksmith's forge, does not run with the land (*Keppel* v. *Bailey*, 1834, 2 My. and K. 517). If, however, the covenant is of a negative kind (*e.g.*, a covenant *not* to build), then a person taking with notice of such covenant will take subject to it, and it can be enforced against him by injunction, and this not upon any idea of the covenant running with the land, but upon a principle of Equity, altogether independent of the Common Law rule (*Tulk* v. *Moxhay*, 1848, 2 Phil. 774; *Luker* v. *Dennis*, 1877, 7 Ch. D. 227; *Haywood* v. *Brunswick Building Society*, 8 Q. B. D. 403; 51 L. J. Q. B. 73). A purchaser or lessee or underlessee who does not choose to investigate the title, or who is prevented by the Vendor and Purchaser Act or the Conveyancing Act 1881 from investigating it because he has not stipulated for the right to do so (*Patman* v. *Harland*, 1881, 50 L. J. Ch. 642), is bound in equity by such restrictive covenants (see Indermaur's Conveyancing, 247). An injunction will not be granted against an underlessee because his tenant is, against

his will, breaking a restrictive covenant in the original lease (*Hall* v. *Ewin*, 57 L. J. Ch. 95). And the original purchaser who entered into the restrictive covenant cannot enforce that covenant against his sub-purchaser, but should take a similar covenant from such sub-purchaser (*King* v. 40 Ch. D. 596; 58 L. J. Ch. 464).

SEMAYNE'S CASE.

(*S. L. C., Vol. I. p.* 104.)

(1605—5 *Coke*, 91.)

The following were the most important points resolved in this case:—

1. It is *not* lawful for the sheriff at the suit of a common person, to break the defendant's house to execute process, but if a defendant flies to or removes his goods to another man's house, the privilege does not extend to protect him there, and, after denial on request made, the sheriff may break the house.

2. In all cases where the king is party the sheriff may break the defendant's house, after request to open the doors.

3. When a house is recovered in a real action, the sheriff may break the house to deliver possession.

—It must be remembered that although the sheriff is justified in entering a third party's house to execute process of the law upon defendant or his property, yet if it happen that defendant be not there, or have no property there, the sheriff is a trespasser. When the sheriff has once obtained entry he can break open the inner doors, and where a defendant after arrest escapes, the sheriff may break his house, or the house of any person to which he escapes, to retake him. "Breaking a house" includes not only the forcing open the door, but even the opening of an unbolted window, though if the window is already partly open it is justifiable to open it

further to effect an entry (*Crabtree* v. *Robinson*, 15 Q. B. D. 312; 54 L. J. Q. B. 544). The sheriff may break into any outshop, or warehouse, which is not connected with a dwell-house (*Hodder* v. *Williams*, 1895, 2 Q. B. 633); but no outer door of any building may be broken to distrain for rent v. *Clarke*, 1894, 1 Q. B. 119), though the distrainor may the garden wall and then enter by an open window (*ibid.*).

Even though express licence under seal is given to break and enter premises, this does not justify such an entry, for such a licence is void in its inception, and any forcible ejection by the act of the party is illegal. (5 Rich. 2, st. 1, c. 8; *Newton* v. *Harland*, 1 Mr. & Gr. 644; *Eldridge* v. *Hawkes*, 18 Ch. D. 199; 50 L. J. Ch. 577.)

It may be useful to state here the law as to imprisonment and arrest under the Debtors Act 1869, 32 & 33 Vict. c. 62. The effect of this statute is to abolish imprisonment for debt except in the following six cases:—

1. Default in payment of a penalty not arising out of contract.

2. Default in payment of sums recoverable summarily before a justice.

3. Default by trustees and others acting in a fiduciary capacity, and ordered by the Court to pay any sum in their possession or under their control.

4. Default in payment by solicitors of sums ordered to be paid by them as such.

5. Default in payment of a sum ordered to be set aside by a debtor by the Court of Bankruptcy, out of salary or income for payment of creditors.

6. Default in payment of sums in respect of which orders are authorised to be made by this Act.

These cases are therefore absolutely excepted, but it is provided that no person shall be imprisoned in any such excepted case for any longer period than one year.

With regard to the exceptions above numbered 3 and 4, it has now been provided by the Debtors Act 1878 (41 & 42 Vict. c. 54), that the Court or Judge may inquire into the

circumstances of the case, and is to have a discretionary power as to imprisoning. Generally in the above cases want of means is no answer to an application to imprison. (*Re Gent, Gent-Davis* v. *Harris*, 40 Ch. D. 190; 58 L. J. Ch. 162.)

Further, the Debtors Act 1869 (section 5) gives the Court power to commit to prison for a period not exceeding six weeks where default is made in payment of a debt due under any order or judgment, *provided it is proved that the debtor has, or has had since the date of the order, means to pay.* This power is to be exercised in the inferior Courts only by a Judge or his deputy by an order made in open Court, showing on its face the ground on which it is issued. The imprisonment is to be no satisfaction of the debt, and it may be mentioned that under the power here given the Judges have required very strict proof of the debtor's means.

As to arrest, sect. 6 of the Debtors Act 1869 provides that in any action in the High Court of Justice the defendant may be arrested for a period not exceeding six months, unless or until he has given prescribed security not to quit England without leave of the Court, where the plaintiff, at any time before final judgment proves (1) good cause of action for £50 or upwards; (2) probable cause for believing that defendant is about to quit England; and (3) that his absence will materially prejudice plaintiff in the prosecution of his action; except as to this last point of proof, where the action is for a penalty other than a penalty in respect of any contract, when it is not necessary, and the proof of the other two facts alone is sufficient. A defendant who has been arrested under this provision cannot be kept in prison after final judgment has been signed (*Hume* v. *Druyff*, L. R. 8 Ex. 214; 42 L. J. Ex. 145).

With regard to this power of arrest, it may here be noticed that there is now no distinction between it and the power under the old writ of *ne exeat regno*. The distinction between legal and equitable debts having since the Judicature Acts disappeared, the power of arrest can only be exercised when the party brings his case within the provisions of the above enactment (*Drover* v. *Beyer*, 13 Ch. D. 242; 49 L. J. Ch. 37).

CALYE'S CASE.

(*S. L. C., Vol. I. p.* 119.)

(1584—8 *Coke*, 32.)

—That if a man comes to a common inn, and delivers his horse to the hostler, and requires him to put him to pasture, which is done, and the horse is stolen, the innkeeper shall not answer for it. To charge an innkeeper on the custom or common law of the realm for the loss of goods:—(1) The inn ought to be a common inn. (2) The party ought to be a traveller or passenger. (3) The goods must be in the inn (and for this reason the innkeeper is not bound to answer for a horse put out to pasture). (4) There must be a default on the part of the innkeeper or his servants in the safe keeping of his guest's goods. (5) The loss must be to movables, and therefore if a guest be beaten at an inn, the innkeeper shall not answer for it.

—An inn is defined as "a house where the traveller is furnished with everything he has occasion for on his way." An innkeeper is defined as "one who professes to supply lodgings and provisions for the night, for all comers who are ready to pay therefor;" and he is bound to receive a traveller into his house and provide properly for him upon his tendering a reasonable price for the same, unless the inn be full (*Browne* v. *Brandt*, 71 L. J. K. B. 367) or the traveller is drunk or suffers from an infectious disorder or is a known thief or a

constable on duty. If the innkeeper fails in his duty he may be indicted at common law, or is liable to an action (*Fell* v. *Knight*, 10 L. J. (Ex.) 277). If all his bedrooms are occupied, the innkeeper is not bound to let a new guest spend the night in a sitting-room (*Browne* v. *Brandt*, 1902, 1 K. B. 696). A person who stays at an inn long enough to lose the character of a traveller can be compelled to leave on a reasonable notice (*Lamond* v. *Richard*, 1897, 1 Q. B. 541). A person received into the inn for temporary refreshment (*e.g.*, dinner, *Orchard* v. *Bush*, 1898, 2 Q. B. 284) becomes a guest (*Medawar* v. *Grand Hotel Co.*, 60 L. J. Q. B. 209). A person who professes to let private lodgings only, or to supply provisions only, is not an innkeeper; and if a man come to an inn on a special contract to board and lodge there, the law does not consider him as a guest but as a boarder, and to render a lodging-house or boarding-house keeper liable for the wrongful act of his servant, he must have been guilty of such a misfeasance or gross misconduct as an ordinary person would not have been guilty of (*Clench* v. *D'Arenberg*, 1 C. & E. 42).

At common law an innkeeper was liable for all losses, unless they arose through the act of God, the king's enemies, or the fault of the guest or his servant; but now, by the Innkeepers Act 1863 (26 & 27 Vict. c. 41) an innkeeper is not liable to make good any loss of, or injury to goods beyond £30, except (1) for a horse or other live animal, or gear appertaining thereto, or any carriage; or (2) where stolen, lost, or injured through the wilful act, or the default, or neglect of the innkeeper, or any servant in his employ; or (3) where the goods are deposited expressly with him for safe custody. But to entitle the innkeeper to the benefit of the Act, a printed copy of section 1 must be exhibited in a conspicuous part of the hall or entrance to the inn (*Spice* v. *Bacon*, 2 Ex. D. 463; 46 L. J. Q. B. 713).

An innkeeper, if his bill is not paid, though he cannot detain his guest's person, has a lien on and may detain goods intrusted to his charge, and this even though they are not the guest's property (*Threlfall* v. *Borwick*, L. R. 10 Q. B. 210; 44 L. J.

Q. B. 87; and see also *Robins* v. *Gray*, (1895) 2 Q. B. 78, where the landlord was held to have a lien on samples sent to a commercial traveller staying at his inn). But an innkeeper has no lien on goods of a third person sent to the guest at the inn for his temporary use—*e.g.*, a piano on hire (*Broadwood* v. *Granara*, L. R. 10 Ex. 417). *Gordon* v. *Silber* (25 Q. B. D. 491; 59 L. J. Q. B. 507) further shows the extent of an innkeeper's lien. There a husband and wife went to the Hôtel Métropole and incurred a large bill, and the proprietor detained all the luggage, and a part of it was the wife's separate property. Held, that though the credit was given to the husband, and the debt was his and not the wife's, yet the innkeeper's lien attached. And with regard to carriages, horses, &c., the innkeeper's lien is not limited to the charge for the care of the carriages and keep of the horses, but extends to the whole charges against the guest (*Mulliner* v. *Florence*, 3 Q. B. D. 484). An innkeeper having a lien has now a power given him of actively enforcing it, it being provided by the Innkeepers Act 1878 (41 & 42 Vict. c. 38) that if a person shall become indebted to him, and shall deposit or leave any personal effects with him or in his inn or adjacent premises for the space of six weeks, the innkeeper, after having advertised a month previously in one London newspaper and one country newspaper circulating in the district a notice describing the goods, and giving (if known) the name of the owner or person who deposited the goods, and of his intention to sell, may duly sell the same by public auction. Any surplus after paying the debt and expenses is to be handed to the person who left or deposited the goods.

THE SIX CARPENTERS' CASE.

(*S. L. C., Vol. I. p.* 132.)

(1611—8 *Coke*, 146*a*.)

Here six carpenters entered a tavern, and were served with wine for which they paid. They were afterwards, at their request, served with bread and more wine, which they consumed and then refused to pay for. Trespass was on these facts brought against the six carpenters, and the only point in the case was whether the non-payment made the entry into the tavern tortious. It was resolved (1) That if a man abuse an authority given by the law, he becomes a trespasser *ab initio*; but (2) Where the authority is given by the party and abused, there he is *not* a trespasser *ab initio*, but he must be punished for his abuse. (3) That non-feasance only cannot make the party who has the licence by law a trespasser *ab initio*, and therefore in this case the mere non-payment did *not* make the carpenters trespassers *ab initio*.

Notes.—The rule laid down in this case that a man abusing an authority given him by the law becomes a trespasser *ab initio*, formerly applied to a distress; but now, by the Distress for Rent Act 1737, if any irregularity occurs in making a distress for rent justly due, the distrainor is not a trespasser *ab* (11 Geo. 2, c. 19, s. 19). If a landlord in distraining is

not merely guilty of some irregularity, but distrains in an unauthorised way, he is then a trespasser from the commencement; and if he make an excessive distress, an action may be brought against him for so doing. If the landlord instructs a broker to distrain, and he does so improperly without the knowledge of the landlord, *e.g.*, by forcing a door or lifting a closed window, though the broker is liable to an action for damages the landlord is not (*Hancock* v. *Austin*, 32 L. J. C. P. 252).

SIMPSON v. HARTOPP.

(*S. L. C., Vol. I. p.* 437.)

(1744—4 *T. R.* 568; *Willes*, 512.)

Decided:—Implements of trade are privileged from distress for rent, if they be in actual use at the time, or if there be any other sufficient distress on the premises.

—This case is placed immediately following the Six Carpenters' Case, as that decision naturally induces some consideration of the law of distress. Distress, which is a remedy by the act of the party, may be defined as the taking of a personal chattel out of the possession of the wrongdoer into the custody of the injured person, in order to procure a satisfaction of the wrong done (Wharton's Law Lexicon, 9th edit., p. 243). It can be used (1) for rent in arrear; (2) in case of cattle damage feasant; (3) under some statutes—*e.g.*, for poor rates; and (4) for omission to do service to the lord's court.

It may be useful here to give a statement of things privileged (*a*) from distress for rent, and (*b*) from execution.

(*a*) The following are privileged from distress for rent:—

1. Things in the personal use of a man.
2. Fixtures affixed to the freehold.
3. Goods of a stranger delivered to the tenant to be wrought on in the way of his ordinary trade.
4. Perishable articles.
5. Animals *feræ naturæ*.
6. Goods in *custodia legis*.
7. Loose money, for it cannot be identified.
8. Wearing apparel, bedding (including bedstead,

Davis v. *Harris*, 1900, 1 Q. B. 729) of the tenant and his family, and tools of his trade, to the inclusive value of £5, unless the tenancy has ended and possession is not given for seven days after demand (Distress Act 1888, s. 4; County Courts Act 1888, s. 147).

9. Railway rolling stock with the owner's name on it (35 & 36 Vict. c. 50).
10. A gas, water, or electric company's meters, and hired gas stoves, are protected by statute.
11. Instruments of a man's trade or profession, *provided* other sufficient distress can be found.
12. Beasts of the plough, instruments of husbandry, and beasts which improve the land, *provided* other sufficient distress can be found.
13. Lodgers' goods are privileged on payment of whatever rent the lodger owes his landlord and compliance with the terms of the Lodgers' Goods Protection Act 1871.
14. In tenancies under the Agricultural Holdings Act 1883 (sects. 45, 54):
    (*a*) Any animal capable of being distrained which belongs to another person and has been taken in by the tenant to be fed at a fair price agreed on may not be seized if other sufficient distress can be found; and even if there is not other sufficient distress, can only be seized to the extent of any part of the agreed price which remains unpaid;
    (*b*) Agricultural or other machinery the *bonâ fide* property of a person other than the tenant, and only hired by him, cannot be seized at all; and
    (*c*) Live stock of all kinds the *bonâ fide* property of a person other than the tenant, and on the tenant's premises

solely for breeding purposes cannot be seized at all.

(*b*) The following are privileged from being taken in execution :—

1. Wearing apparel and bedding and implements of trade of any judgment-debtor, not exceeding £5.
2. Goods of a stranger.
3. Goods in *custodia legis*.
4. Fixtures affixed to the freehold.
5. (In the case of an elegit.) Advowsons in gross, and glebe lands.

A landlord may usually distrain for six years' rent. But if the goods have been taken in execution before the landlord has distrained, then he is only entitled to one year's rent as against the execution creditor (8 Anne, c. 14); and if the tenancy is weekly or monthly, only to four weeks' or months' arrears (7 & 8 Vict. c. 96, s. 67). As regards agricultural tenants, a landlord may only distrain for one year's rent (46 & 47 Vict. c. 61, s. 44). Against his tenant's trustee in bankruptcy, a landlord can distrain for arrears up to the date of adjudication not exceeding six months; generally as to how bankruptcy affects a landlord's right of distress, see the Preferential Payments in Bankruptcy Act 1888 (51 & 52 Vict. c. 62, s. 1 (4); and the Bankruptcy Act 1890 (53 & 54 Vict. c. 71, s. 28). (Indermaur's "Principles of Common Law," 9th ed., 86, 87.)

LAMPLEIGH v. BRAITHWAITE.

(*S. L. C., Vol. I. p.* 141.)

(1616—*Hobart*, 105.)

:—That a mere voluntary courtesy will not uphold *assumpsit*, for to do so, it must be moved by a precedent request of the party who gives the promise, for then the promise though it follows, yet is not alone, but couples itself with the request. Labour, though unsuccessful, may form a valuable consideration.

rule requiring a valuable consideration to support a promise, is, of course, well known, and needs no comment in these notes; but it will be useful to observe here, that such a consideration consists of either: "some benefit to the party making the promise, or to a third person by the act of the promisee, or some loss, trouble, inconvenience to, or charge imposed upon, the party to whom the promise is made."

Considerations which, with reference to their nature, are divided into good and valuable, are also, with reference to time, called executed, executory, contemporaneous, and continuing. An executed or past consideration will not support an action unless founded upon a previous request expressed or implied; and this previous request will be implied in certain cases of which the following are the chief:—

1. Where plaintiff has been compelled to do that which defendant ought to have done and was legally compellable to do.

2. Where plaintiff has voluntarily done that which defendant

was legally compellable to do, and in consideration thereof the latter has afterwards expressly promised to repay or to indemnify him.

3. Where defendant has taken the benefit of the consideration.

4. Where the plaintiff has voluntarily done some act for the defendant which is for the public good—*e.g.*, in paying the expenses of burying a person in the absence of the one legally liable to pay the same. (Indermaur's "Principles of Common Law," 9th ed., 44.)

COGGS v. BERNARD

(*S. L. C., Vol. I. p.* 173.)

(1704—2 *Lord Raymond*, 909.)

Here the defendant had promised the plaintiff to take up several hogsheads of brandy then in a certain cellar, and lay them down again in a certain other cellar, safely and securely; and by the default of the defendant one of the casks was staved and a quantity of brandy spilt. Verdict for plaintiff on a plea of not guilty, and on motion in arrest of judgment, *Decided* :—That if a man undertake to carry goods safely and securely, he is responsible for any damage they may sustain in the carriage through his neglect, though he was not a common carrier, and was to have nothing for his pains. Lord Holt here classifies bailment as follows:—(1) *Depositum*, or a naked bailment of goods to be kept for the use of the bailor. (2) *Commodatum*, where goods are lent to the bailee *gratis* to be used by him. (3) *Locatio rei*, where goods are lent to the bailee for hire. (4) *Vadium*, pawn. (5) *Locatio operis faciendi*, where goods are delivered to be carried, or something is to be done about them, for a reward to be paid to the bailee. (6) *Mandatum*, a delivery of goods to somebody who is to carry them or do something about them gratis.

WILSON v. BRETT.

(1843—11 *M. & W.*, 113.)

Decided:—That a person who rides a horse, at the request of the owner, for the purpose of exhibiting and offering him for sale without any benefit to himself, is bound to use such skill as he possesses; and if proved to be conversant with and skilled in horses, he is equally liable with a borrower for an injury done to the horse, for he is bound to use the skill which he possesses.

Notes on the above two cases.—These two cases are quoted together, the first as being the leading case on the subject, and showing the general principle that though a gratuitous bailee is not liable for nonfeasance, yet he is chargeable for misfeasance when it amounts to *gross* negligence; and the latter as somewhat altering this general principle, by deciding that if the gratuitous bailee is in such a situation as to imply skill in what he undertakes to do, then if in acting he omits to use that skill, such omission is imputable to him as gross negligence.

The principle extends beyond bailments. It may be stated generally thus: a gratuitous promisor is not liable for nonfeasance, but is liable for gross negligence in performance (*Skelton* v. *L. & N.W. Ry.*, L. R. 2 C. P. at 636); for the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in performance (*Shilliber* v. *Glynn*, 2 M. & W. 193). So in *Wilkinson* v. *Coverdale* (1 Esp. 75), where C. gratuitously promised to insure a house for W. and did it so carelessly that W.

not able to sue upon the policy, C. was held liable to W. (1 S. L. C. 188, 189; Anson on Contracts, 10th ed., 98).

In considering the subject of bailments, we come to that of carriers. A common carrier has been defined as "a person who undertakes to transport from place to place for hire the goods of such persons as think fit to employ him." At the common law, carriers were insurers liable for all losses, except those arising from the act of God (*Nugent* v. *Smith*, 45 L. J. C. P. 697), or of the King's enemies, or the natural deterioration or inherent vice of the thing carried (*Blower* v. *G. W. Ry.*, 41 L. J. C. P. 268); and to obviate this liability it became their practice to put up in their warehouses notices limiting their liability, and provided it could be shown that a customer saw such notice, this was usually held to create a contract between the carrier and the customer. The Carriers Act, 1830 (1 Wm. 4, c. 68) provides that land carriers shall not be liable for any loss or injury to certain articles therein specified (such as gold, silver, pictures, &c.) when their value exceeds £10, unless the nature and value of the articles were declared, and an increased rate of charge paid or agreed to be paid; and that the carrier may demand and receive an increased rate *to be duly notified in his warehouse*. No general notices or conditions are to limit the carrier's liability, but nothing in the Act contained is to prevent a special contract being entered into between the carrier and the customer. This statute does not protect the carrier from any loss arising from the felonious act of any servant in his employ (see *Shaw* v. *Gt. Western Ry.*, 1894, 1 Q. B. 381). After this Act railway companies frequently escaped its provisions by putting notices on the receipts given to persons sending goods, and this was held to constitute a special contract between the parties. The Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31), therefore, provides that no such contract by a railway or canal company shall be of effect unless signed by the party delivering the goods to be carried; but the company may limit its liability by *reasonable* conditions, the reasonableness of such conditions to be decided by the Judge before whom the matter comes. This Act also exempts

those companies from liability for loss of (1) horses beyond the sum of £50, (2) neat cattle £15, (3) sheep and pigs £2 per head, unless a higher value is declared, and an increased rate of charge is paid or agreed to be paid. It has been decided that this Act does not apply to contracts made by railway companies exempting themselves from liability by loss or detention beyond their own lines (*Zunz* v. *South Eastern Ry. Co.*, L. R. 4 Q. B. 539). It is provided by the Railway Regulations Act 1868 (31 & 32 Vict. c. 119, s. 14) that when a company by through booking contracts to carry partly by rail, or canal, and sea, a condition exempting such company from liability from any loss by danger of seas or navigation, published in a conspicuous manner in the office where the booking is effected, and printed in a legible manner on the receiving-note, shall be perfectly valid.

A common carrier is bound to carry all goods delivered to him for carriage provided the price be paid or tendered, that they are of the nature he ordinarily carries, that they are not dangerous, and that he has room in his vehicle. If a person delivers dangerous goods to a carrier without informing him of their dangerous nature, he will be liable for any accident arising from them to the carrier, or those who are concerned in the carriage (*Farrant* v. *Barnes*, 11 C. B. (N. S.) 553; 31 L. J. (C. P.) 137). Where goods are sent by rail addressed to the consignee at a certain station to be left till called for, the company's liability as common carriers continues for a reasonable time after the goods arrive at the station, but after this their liability as carriers ceases, and they are merely liable as bailees for hire (*Chapman* v. *Gt. Western Ry.*, 5 Q. B. D. 278; 49 L. J. Q. B. 420).

Railway companies are liable as common carriers with regard to their passengers' personal luggage if it is duly labelled and put in the van; if this is not done but it is taken in the carriage, then it seems that they are still liable as common carriers subject to this modification, that in respect of the passenger's interference with their exclusive control of his luggage, the company are not liable for any loss or injury

occurring during its transit, to which the act or default of the

liability as regards passengers' luggage commences a reasonable time before the train starts (*Ib.*), and terminates as soon as the luggage is delivered to the owner or his agent (*Hodkinson* v. *L. & N. W. Ry. Co.*, 14 Q. B. D. 228; 33 W. R. 662). The liability in respect of passengers' personal luggage exists independently of contract, so that where a master took a ticket for his servant to travel by rail with him, it was held that the servant might maintain an action in his own name for the loss of his luggage (*Marshall* v. *York, &c. Ry. Co.*, 21 L. J. C. P. 34). And where a servant took his own ticket, for which, however, the master paid, it was held that the master might sue for the loss of certain liveries, the property of the master, but which formed part of the servant's luggage (*Meux* v. *G. E. Ry. Co.*, (1895) 2 Q. B. 387).

ASHBY v. WHITE.

(*S. L. C., Vol. I. p.* 240.)

(1703—2 *Lord Raymond*, 938.)

At an election of burgesses for Parliament, the plaintiff, being entitled to vote, tendered his vote for two candidates; but such vote was refused, and notwithstanding those candidates for whom the plaintiff tendered his vote were elected, yet he brought this action against the constables of the borough for refusing to admit his vote. *Decided*:—That the action was maintainable, for it was an injury, though without any special damage.

Notes.—The above case decides, that although a person has suffered no actual or real damage, yet if he has suffered a legal wrong or injury, capable in legal contemplation of being estimated by a jury, an action lies. But the decision in this case must be carefully distinguished from those cases in which damage is sustained by the plaintiff, which damage is not occasioned by anything which the law considers an injury. In such cases the party damaged is said to suffer *damnum sine injuria*, and can maintain no action, *e.g.*, seduction. See, in further exemplification of the above decision and these remarks, the important cases of *Fray* v. *Voules* (1 E. & E. 839), *Marzetti* v. *Williams* (1 B. & Ad. 415), *Chasemore* v. *Richards* (7 H. L. Ca. 349), and *Bradford Corporation* v. *Pickles* (1895, A. C. 587; 63 L. J. Ch. 101). Note and distinguish, however, the decision in *Ballard* v. *Tomlinson* (29 Ch. D. 115; 54 L. J. Ch. 454), which shows and decides that—although as laid down in *Chasemore* v. *Richards*, and *Bradford Corporation* v.

a landowner may sink a well and drain off spring water which would otherwise percolate through to his neighbour's land, this being merely *damnum sine injuria*—yet if he lets it flow on, he must let it so flow in an undefiled state, and is liable to an action if he fouls it.

Attention may here be drawn to *Allen* v. *Flood* (1898, A. C. 1; 67 L. J. Q. B. 119), in which it was held by the House of Lords that if A., from ill will to B., induces C. to do an act which C. has a legal right to do, B. has no right of action against A., although B. suffers damage. But if A. knowingly induces B. to break his contract with C. (*Lumley* v. *Gye*, 2 E. & B. 216; *Bowen* v. *Hall*, 50 L. J. Q. B. 305), C. can sue A. unless A. had sufficient justification for his conduct (*Glamorgan Coal Co.* v. *South Wales Miners' Federation*, 71 L. J. K. B. 1001). Also if A. by coercion or intimidation induces B. to leave C.'s employment or to cease dealing with C., here C. can sue A. if he suffers loss (*Temperton* v. *Russell*, 62 L. J. Q. B. 412). Again, where A. and B. combine to develop their trade by lawful means, and this causes damage to C., C. has no right of action (*Mogul Steamship Co.* v. *McGregor*, 61 L. J. Q. B. 295); but if A. and B. conspire to injure C. by inducing others not to contract or deal with C., or to leave C.'s employment, here C. can sue A. and B. if damage thereby results (*Quinn* v. *Leathem*, 1901, A. C. 495; 70 L. J. C. P. 76; *Read* v. *Operative Stonemasons*, 1902, 2 K. B. 732; 71 L. J. K. B.

In some cases, there must be a combination of *injuria* and *damnum* to give a right of action, *e.g.*, fraud, negligence, seduction, breach of a public duty, and most cases of slander.

BIRKMYR v. DARNELL.

(*S. L. C.*, *Vol. I. p.* 2[illegible]

(1704—1 *Salkeld*, 27.)

Decides:—That a promise to answer for the debt, default, or miscarriage of another person, for which that other remains liable, is within section 4 of the Statute of Frauds, but *not* if that other does not remain liable.

PETER v. COMPTON.

(*S. L. C.*, *Vol. I. p.* 316.)

(1694—*Skinner*, 353.)

This was an action upon an agreement of the defendant, in consideration of one guinea paid him, to give the plaintiff fifty on the day of his marriage. The marriage did not happen within a year, and the question was, whether or not the agreement must be in writing. *Decided*:—That "an agreement which is not to be performed within one year from the making thereof" means, in the Statute of Frauds, an agreement which, from its terms, is incapable of being performed within the year; and therefore the agreement in this case need not be in writing.

two cases.—The following is the 4th section of the Statute of Frauds (29 Car. 2, c. 3):—"No action shall be

brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement which is not to be performed within one year from the making thereof, *unless* the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

The above two cases are therefore on two of the agreements mentioned in this section, viz., guarantees, and agreements not to be performed within a year. The case of *Birkmyr* v. *Darnell* is on the point of guarantee, deciding that if the original party remains liable, then the agreement is within the statute, and must be in writing; but if the original party does not, in fact, remain liable then it is entirely a fresh agreement, and not within the statute; and a guarantee is therefore properly defined as a collateral promise to answer for the debt, default, or miscarriage of another for which that other remains primarily liable. The Mercantile Law Amendment Act 1856 (19 & 20 Vict. c. 97), enacts in section 3 that the consideration for a guarantee need not appear on the face of the written instrument (see *post*, p. 38); and the same statute also (sect. 5) enacts that a surety who discharges the liability of his principal is to be entitled to an assignment of all securities held by the creditor, even although they may be deemed at law to be satisfied by his payment. The Partnership Act 1890 (53 & 54 Vict. c. 39, sect. 18), enacts that a continuing guarantee given either to a firm or to a third person in respect of the transactions of a firm is (unless otherwise agreed) revoked as to future transactions by any change in the constitution of the firm to which, or for which, the guarantee was given.

As to the acts that will operate to discharge a surety from

his liability, see Indermaur's "Principles of Common Law," 9th ed., 54, 55. As to contribution between sureties, see *Deering* v. *Earl of Winchelsea* (Indermaur's "Conveyancing and Equity Cases," 9th ed., 87); and note that a surety who is sued may by means of "third party procedure," obtain contribution in that action from his co-sureties. (Indermaur's "Manual of Practice," 8th ed., 39–41.)

The case of *Peter* v. *Compton* well explains what is meant by an agreement not to be performed within one year from the making thereof, showing that where on the face of the agreement it is capable of being performed within the year, then it is outside the statute, and need not be in writing; though where, from its very terms, it is incapable of being so performed, then it must be in writing. However, with regard to this case, there is this to be observed, that it might have been decided in the same way upon another ground, viz., that all which was to be done by one of the parties was to be done within a year (*Donellan* v. *Read*, 3 B. & Ald. 899). See also *McGregor* v. *McGregor* (21 Q. B. D. 424; 57 L. J. Q. B. 591), where it was held that an oral agreement between a husband and wife to separate, and that the husband should pay his wife £1 a week, was not within the statute, and need not be in writing. A contract made on one day for one year's service to commence on the next day is outside the statute and need not be in writing (*Smith* v. *Gold Coast Explorers*, 72 L. J. K. B. 235); but it would be otherwise if a contract is made on Monday for a year's service to begin on Wednesday (*Britain* v. *Rossiter*, 48 L. J. Q. B.

WAIN v. WARLTERS.

(*S. L. C., Vol. I. p.* 323.)

(1804—5 *East*, 10.)

Decided:—That by the word "agreement" in section 4 of the Statute of Frauds (29 Car. 2, c. 3), must be understood not only the promise itself, but also the consideration for the promise; so that a promise appearing to be without consideration on the face of the written agreement was held *nudum pactum*, and gave no cause of action.

Notes.—It is, however, sufficient if the consideration is capable of being implied from the writing, though it does not actually appear on its face; thus it is not necessary in a contract in writing for the sale of goods, that the price of the goods should be actually named, if in fact no specific price has been agreed on, for it will be implied that the contract is to pay a reasonable price. But if a specific price is agreed on, then that price must be mentioned in the contract, and oral evidence would be inadmissible (*Hoadley* v. *M'Laine*, 10 Bing. 482).

The decision in *Wain* v. *Warlters* is now subject to the statute 19 & 20 Vict. c. 97, s. 3, which provides that a guarantee shall not be invalid by reason only that a consideration does not appear in writing, or by necessary inference from a written document. But of course there must even here be a consideration, though it need not appear in the written document.

In the case also of bills of exchange and promissory notes, by the custom of merchants it is not necessary that the consideration should appear on the face of the instrument.

PAGE v. MORGAN.

(1885—15 *Q. B. D.* 228.)
(54 *L. J. Q. B.* 434.)
(33 *W. R.* 793.)

In this case the plaintiff had sold certain wheat by sample to the defendant, the contract being by word of mouth only and the price over £10. The plaintiff sent the wheat by barge to the defendant's mill, where it arrived late one evening, and the next morning the defendant had a portion of it taken into the mill, and after examining it he then rejected the whole of the wheat on the ground that it was not equal to sample. The plaintiff brought this action for the price, and the defendants set up that the provisions of the 17th section of the Statute of Frauds had not been complied with, and that therefore there was no good contract.

Decided:—That there was a good contract within the 17th section of the Statute, there having been an acceptance and receipt within the meaning of that section—that the only acceptance required by the Statute was such a dealing with the goods as could but have taken place upon admission of a contract, and that the defendant, acting as above stated, and his rejection on the above ground, clearly amounted to a recognition of the contract.

—This case was decided on the 17th section of the Statute of Frauds which has been repealed by the Sale of Goods Act 1893 (56 & 57 Vict. c. 71), but it is equally applicable to the new enactment. Section 4 of the Sale of Goods Act provides as follows:—(1) "A contract for the sale of any goods of the value of £10 or upwards, shall not be enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent on that behalf. (2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery. (3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not."

It will be noticed that under this enactment (as under the now repealed 17th section of the Statute of Frauds), to render the contract actionable there must be either writing, earnest, part payment, or acceptance and receipt. The point of chief difficulty on the 17th section of the Statute of Frauds was as to what would amount to "acceptance and receipt," and the above case of *Page* v. *Morgan* decided that what was really required by the statute was a recognition of the contract, and that though acceptance and receipt are two distinct things, yet receipt under such circumstances as to import recognition of the contract is also the acceptance contemplated by the statute. In this case there was a plain recognition of the contract, for if there was no contract, why did the defendant take the goods into his mill for examination? It will be observed that the third clause of section 4 of the Sale of Goods Act 1893, practically declares the law to be

as laid down in *Page* v. *Morgan*, and this case forms a good illustration of the meaning of that enactment. *Abbott* v. *Wolsey* (1895, 2 Q. B. 97; 64 L. J. Q. B. 587) is a case decided on section 4 of the Sale of Goods Act 1893, is on the same point, and is even a stronger case than *Page* v. *Morgan*. In that case there was an oral contract for the sale of hay for more than £10. The hay was sent on a barge to the buyer's wharf, and the buyer went on to the seller's barge, looked at the hay, rolled some back to examine it, and ultimately refused to have it. It was held that there had been a sufficient recognition of the contract to satisfy the provisions of the statute.

CUMBER v. WANE.

(*S. L. C., Vol. I. p.* 338.)

(1719—1 *Strange*, 426.)

Held:—That giving a note for £5 cannot be pleaded in satisfaction of £15.

Notes.—This means that a smaller sum cannot be given in extinguishment of a greater, though something else might so operate; thus a horse might be given in discharge of a debt of £15, though it was not worth even £5. This would be a case of accord and satisfaction. It should be here observed that in the above case it does not appear that the note was a negotiable note, and it has since been decided that a *negotiable* security may operate, if so given and taken, in satisfaction of a debt of greater amount (*Sibree* v. *Tripp*, 15 M. & W. 23), the point being that where anything not actually money, but of a different value, is given, the Court will not enter into the question of its adequacy. This principle also applies to a cheque, so that where A. being indebted to B. in £125 7*s.* 9*d.* for goods sold and delivered, gave B. his own cheque for £100, payable on demand, which B. accepted in satisfaction, it was held that this amounted to a good accord and satisfaction (*Goddard* v. *O'Brien*, 9 Q. B. D. 37). Again, if there is any doubt, or any *bond fide* dispute as to the amount due, a smaller sum may be a satisfaction of a larger amount claimed. A smaller sum may also be satisfaction of a greater if a receipt is given under seal; and under the Bankruptcy Act 1890 (53 & 54 Vict. c. 71, sect. 18), a majority in number and three-fourths in value of all the creditors who have proved in bankruptcy proceedings, may resolve to accept a composition which shall afterwards, when approved by the Court, bind all the creditors, and the payment of which composition will duly

discharge the debtor. By the Bills of Exchange Act 1882 (45 & 46 Vict. c. 61), sect. 62, it is enacted that a bill or note is discharged if the holder at, or after maturity, absolutely and unconditionally renounces his rights against the acceptor or maker, either in writing or by delivering up the instrument; and in the same way the holder may renounce his rights against any party to the instrument before, at, or after maturity. But it seems that a bare agreement, even in writing, to take payment otherwise than as provided by the bill or note, is no answer to a claim thereon. (See 1 S. L. C. 351.)

Following out the principle of the above case, it has been held that an agreement between a judgment debtor and his judgment creditor, that in consideration of the debtor paying down part of the judgment debt and costs, and in consideration of his paying to the creditor the residue by instalments, the creditor would not take any proceedings on the judgment, was *nudum pactum*, being without consideration, and did not prevent the creditor, after payment of the whole debt and costs, from proceeding to enforce payment of the interest upon the judgment (*Foakes* v. *Beer*, 9 App. Cas. 605; 54 L. J. Q. B. 130). This case was followed in *Underwood* v *Underwood*, 63 L. J. P. 109, where the Divorce Court had ordered a husband to pay £40 a year alimony to his wife, and by a signed agreement between the husband and wife made when £16 arrears were due the wife agreed to give up the arrears and all future payments for £10 cash. The agreement was held void.

ARMORY v. DELAMIRIE.

(*S. L. C., Vol. I. p.* 356.)

The plaintiff, being a chimney-sweeper's boy, found a jewel, and carried it to the shop of the defendant who was a goldsmith, to know what it was. He delivered it to an apprentice, who took out the stone, and the master offered him three-halfpence for it. The plaintiff refused to take it, and insisted on having it returned, whereupon the apprentice delivered him back the socket without the stone; and so the plaintiff now brought an action of trover against the master. *Decided*:—(1) The finder of a jewel may maintain an action for conversion thereof against the wrongdoer for he has a good title against all but the right owner. (2) A master is liable for a loss of his customer's property intrusted to his servant in the course of his business. (3) When a person, who has wrongfully converted property, will not produce it it shall be presumed as against him to be of the best description.

The chief and important decision in the above case is that numbered (1), showing that a finder of property has a good title against all except the rightful owner. It does not appear in the above case where the boy found the jewel, but that was immaterial to his rights against an entire stranger. But *South Staffordshire Waterworks* v. *Sharman* (1896, 2 Q. B. 44;

65 L. J. Q. B. 460), lays down that when a person has possession of a house or land, and has the manifest intention to exercise control over it and the things in or on it, and a servant, guest, or stranger finds something (*e.g.*, a ring) in the house or on the land or in a pond on the land, the finder has no title or right as against the owner of the house or land. This does not conflict with *Bridges* v. *Hawkesworth* (21 L. J. Q. B. 75), when a customer found a bundle of bank-notes on the floor of a barber's shop, and was held entitled to them as against the barber, for the notes being dropped in the public part of the shop were never in the custody of the barber or within the protection of his house.

The evidence to be adduced on the trial of an action for damages for the wrongful conversion of goods—formerly called an action of trover—is (*a*) that the plaintiff was in possession of the goods, or had a right of property in them with the right to immediate possession, (*b*) that the goods came to defendant's possession, (*c*) that he or his agent converted them, and (*d*) their value. As to the conversion, if the goods came lawfully into the other party's possession, a demand is first necessary to make his possession unlawful.

The student desiring to further consider the subject of wrongful conversion of goods, is referred to the following cases on that subject:—*Hollins* v. *Fowler* (L. R. 7 H. L. 757; 20 W. R. 808); *Cochrane* v. *Rymill* (27 W. R. 776; 40 L. T. 744); *National Mercantile Bank* v. *Hampson* (5 Q. B. D. 177; 28 W. R. 424); *Taylor* v. *McKeand* (5 C. P. D. 358; 49 L. J. C. P. 563); *Barker* v. *Furlong* (1891, 2 Ch. 172; 64 L. T. 411). See also Indermaur's "Principles of Common Law," 9th ed., 346, 352, 353.

DUCHESS OF KINGSTON'S CASE.

(*S. L. C. Vol. II. p.* 731.)

(1776—*Bul. N. P.* 244.)

In this case there were two questions submitted to the Judges:—(1) Is the sentence of a spiritual court against a marriage, in a suit for jactitation of marriage, conclusive, so as to stop the counsel for the Crown from proving the said marriage in an indictment for bigamy? (2) Admitting such sentence to be conclusive upon such indictment, may the counsel for the Crown be admitted to avoid the effect of the sentence by proving the same to have been obtained by fraud or collusion? *Decided*:—(1) That the sentence was *not* so conclusive. And (2) That even admitting that it were, yet it might be avoided by showing fraud or collusion.

COLLINS v. BLANTERN.

(*S. L. C., Vol. I. p.* 369.)

(1767—2 *Wilson*, 341.)

In this case the plaintiff sued on a bond executed by certain parties, of whom the defendant was one, the obligation of which was £700 conditioned for payment of £350. The defendant pleaded the following facts.

which showed that the consideration though not appearing on the face of the bond was illegal: Certain parties were prosecuted for perjury by one John Rudge, and pleaded not guilty. According to an arrangement the plaintiff gave his promissory note to the prosecutor, John Rudge, he to forbear further prosecuting, and as part of the arrangement the bond on which plaintiff sued was executed to indemnify him. The question was whether such a plea was good. *Decided*:—That the plea was good, for illegality may be pleaded as a defence to an action on a bond.

Notes.—These two cases are placed together as both relating to the doctrine of estoppel, which may be defined as "an admission, or something treated by the law as equal to an admission, of such a high and conclusive character, that the party whom it affects is not permitted to answer or offer evidence against it." Estoppel is of three kinds, (1) By matter of record, (2) By deed, (3) *In pais*, which means matter of fact or circumstances, *e.g.*, where an infant makes a lease, and accepts rent after he comes of age, or where any person stands by and allows a thing to be done. The first of the above two cases deals with the subject of estoppel by matter of record, and the second with estoppel by deed, and particularly shows that the doctrine does not apply where fraud or illegality exists.

In connection with the subject of estoppel may be noted the case of *Scholfield* v. *Earl of Londesborough* (1895, 1 Q. B. 536; 64 L. J. Q. B. 293). There a bill of exchange for £500 was, after acceptance, fraudulently altered by the drawer into a bill for £3500, the stamp being sufficient to cover the larger amount, and the bill when accepted having had spaces on the face of it which enabled the alteration to be made. A *bonâ fide* holder for value sued the acceptor for the full amount of

the bill as altered, but it was held that the acceptor was only liable for £500 (see Bills of Exchange Act, 1882, sect. 64, *post*, p. 71). It was held that the acceptor of a bill owes no duty to any one taking the bill other than the duty of paying on presentment, and therefore is not estopped by any carelessness in accepting it in a particular form, from setting up a forgery.

MERRYWEATHER v. NIXAN.

(*S. L. C., Vol. I.*;
(1799 8 *T. R.*

ed :—That if A. recover *in tort* against two defendants and levy the whole damage on one, that one cannot recover a moiety against the other for his contribution; though it is otherwise in assumpsit.

Notes.—This decision seems to result from the maxim "*Ex turpi causâ non oritur actio*," and the whole decision may be shortly expressed by saying that as between defendants *ex contractu* the law allows contribution, but not between defendants *ex delicto*. An exception was created by the Directors Liability Act 1890 (53 & 54 Vict. c. 64), which provides (sect. 5) that in case of untrue representations made by directors of companies whereby they become liable to pay damages under the Act, each director shall be entitled to contribution *as in cases of contract* from any other person who, if sued separately, would have been liable.

In considering this subject, reference should also be made to the Libel Act 1888 (51 & 52 Vict. c. 64, s. 5), which provides for the consolidation of different libel actions in respect of the same or substantially the same libel, and that the damages shall then be assessed in one sum; but that the damages shall be apportioned, and the result be generally the same as if the actions had been tried separately.

In an action of tort against several defendants who appear together, the proper judgment is against them all for the entire amount of the damages and costs; but when the defendants sever in their defences, then though each defendant is liable for the whole damages and the general costs of the

action, yet the costs of and incidental to the separate defence are to be taxed against each individual only, and not against the others (*Stumm* v. *Dixon*, 22 Q. B. D. 529; 58 L. J. Q. B. 183.)

Where a person instructs another to do an act manifestly illegal in itself, and that other does it, he has no right to be indemnified by the person so instructing him although he had undertaken to indemnify him from the consequences; but it is otherwise if the act is not manifestly illegal, and he did not know it to be so. (Indermaur's "Principles of Common Law," 9th edit., p. 323.) Thus where A ordered firebricks to be made by B. with a certain mark on them, which A. knew, but B. did not know, was C.'s trademark, and C. got an injunction with damages and costs against B., it was held B. could recover those damages and costs from A. (*Dixon* v. *Fawcus*, 30 L. J. Q. B. 137). In *Burrows* v *Rhodes* (68 L. J. Q. B. 545) a person who had been induced, by the fraud of the defendant, to do a criminal act in the belief that it was innocent, was allowed to recover from the defendant all losses he had sustained.

Where an action is brought against a person who has by reason of contract, or on some equitable principle, a claim for contribution or indemnity over against some other person or persons, a special course is now given for his protection, whereby he can bring such third parties in, in that action, bind them by the proceedings, and actually recover his contribution or indemnity in that action. (Indermaur's "Manual of Practice," 8th edit., 339 11.)

MITCHELL v. REYNOLDS.

(*S. L. C.*, *Vol. I. p*

(1711—1 *P. Wms.*

Here the defendant had assigned to the plaintiff a bakehouse, and had executed a bond not to carry on the trade of a baker within the parish for a period of five years, under a penalty of £50. This action was now brought on the bond, and the defendant pleaded that it was void at law. *Decided*:—That the bond was good, as it only restrained the defendant from trading in a particular place, and was on a reasonable consideration, but that it would have been otherwise if on no reasonable consideration, or to restrain a man from trading at all.

MALLAM v. MAY.

843—11 *M. & W.* 653.)

By articles it was agreed that defendant should become assistant to the plaintiffs in their business of surgeon-dentists for four years; that plaintiffs should instruct him in the business of a surgeon-dentist; and that after the expiration of the term the defendant should not carry on that business in London, or in any

of the towns or places in England or Scotland where the plaintiffs might have been practising before the expiration of the said service. *Decided*:—That the stipulation not to practise in London was valid, the limit of the City of London not being too large for the profession in question, but that the stipulation as to not practising in towns where the plaintiffs might have been practising during the service, was an unreasonable restriction, and therefore illegal and void; and, finally, that the stipulation as to not practising in London was not affected by the illegality of the other part.

Notes on these two Cases.—In *Mitchell* v. *Reynolds* it was held that all contracts in general restraint of trade were void, because they tended to discourage industry, enterprise, and competition, and this is generally the case even now; but there may be exceptional cases under which a restraint without limit may be held good. This has been established by *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (1894, A. C. 535; 63 L. J. Ch. 908), in which it was laid down that a contract in restraint of trade which is even general in its nature is not necessarily invalid (though it usually is); but the true test of the validity of such a contract is whether it is or is not unreasonable, and that a covenant of this kind may be unlimited, provided that it is not more than is reasonably necessary for the protection of the covenantee, and is in no way injurious to the interests of the public. The question of reasonableness or unreasonableness must mainly depend on the circumstances of each particular case, for naturally some trades or callings may require a wider limit than others, and it is therefore impossible to lay down any fixed rule as to when a restraint will be reasonable and when it will not. In the Nordenfelt case, a manufacturer of guns and ammunition for war sold his

business and covenanted not to compete for twenty-five years in any part of the world, and this was held valid. (See also *Badische Fabrik* v. *Schott*, 61 L. J. Ch. 698, and *Underwood* v. *Barker*, 68 L. J. Ch. 201.)

The case of *Mallam* v. *May* plainly shows that agreements in restraint of trade are divisible, *i.e.*, part may be void while part remains good. With regard to all contracts in restraint of trade, it is important to remember that to render them good they must always be founded on a valuable consideration, and this notwithstanding that the contract may be under seal, in which we find an exception to the rule that contracts under seal require no consideration.

Where a limit of space is fixed, *e.g.*, within two miles, the distance must be measured on the map as the crow flies, and not by the nearest road, unless otherwise expressed, *Mouflet* v. *Cole* (1872, 42 L. J. Ex. 8).

When the goodwill of a business is sold, the vendor should always be reasonably restrained by agreement from carrying on a like business. If there is no prohibition of this kind, there is nothing to prevent the vendor setting up a siness; but the vendor must not solicit the former (*Trego* v. *Hunt*, 73 L. T. 514, overruling *Pearson* v. *Pearson*, 27 Ch. D. 145; 54 L. J. Ch. 32); and of course such a vendor must not represent himself as still being in fact the old firm (*Pearson* v. *Pearson*, *supra*). Where the trustee of a bankrupt sells the bankrupt's business, if the bankrupt does not join and covenant against carrying on a like trade (and he cannot be compelled to do so), there is nothing to prevent him from setting up a similar business (*Walker* v. *Mottram*, 19 Ch. D. 355; 51 L. J. Ch. 108). A covenant in general terms not to carry on a business again "so far as the law allows," is bad as being too vague for the law to enforce (*Davies* v. *Davies*, 36 Ch. D. 359; 56 L. J. Ch. 962). A covenant by the vendor of goodwill not to enter into competition does not prevent the vendor's wife doing so with her separate property (*Smith* v. *Hancock*, 62 L. J. Ch. 477).

MILLER v. RACE.

(*N. L. C., Vol. I. p.* 462.)

(1791—1 *Burr.* 452.)

Decided :—That the property in a bank note passes like cash, by delivery; and a party taking it *bonâ fide, and for value*, is entitled to retain it as against a former owner from whom it was stolen.

Notes. This case establishes the above principle in favour of all negotiable instruments, provided they are transferred during their currency, but if the party taking the negotiable instrument has notice of any defect of title, then of course he will not be entitled to retain it against the true owner. This notice may be actual or constructive, and where a person takes a negotiable instrument under such suspicious circumstances as to put him upon inquiry, and he does not inquire, his omission to do so will amount to constructive notice, and he cannot be said to be a *bonâ fide* holder. (See *Jones* v. *Gordon*, 2 App. Cas. 616; 57 L. J. Bk. 1; *Sheffield* v. *London Joint Stock Bank*, 13 App. Cas. 333; 57 L. J. Ch. 986; and *London Joint Stock Bank* v. *Simmons*, 1892, A. C. 201; 61 L. J. Ch. 723.)

As to things other than negotiable securities, a purchaser if they are stolen acquires no title unless he bought in market overt and *bonâ fide*, and even then, if the offender is prosecuted to conviction, no title is acquired, as they revest on conviction in the true owner, notwithstanding any intermediate dealing with them (Larceny Act 1861, sect. 100; Sale of Goods Act 1893, sect. 24; and see before the 1893 Act, *Bentley* v. *Vilmont*, 12 App. Cas. 471; 57 L. J. Q. B. 18). But where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods does not revest in

the person who was the owner by reason only of the conviction of the offender (Sale of Goods Act 1893, sect. 24). In consequence of this enactment the case of *Moyce* v. *Newington* (4 Q. B. D. 32; 48 L. J. Q. B. 125), which was overruled by *Bentley* v. *Vilmont* (supra), is now good law.

There being this difference between things negotiable and not negotiable, it may be well to quote the following passage from "Smith's Leading Cases":—"Whenever an instrument is such that the *legal* right to the property secured thereby passes from one man to another by the delivery thereof, it is, properly speaking, a negotiable instrument, and the title to it will vest in any person taking it *bonâ fide* and for value, whatever may be the defects in the title of the person transferring it to him. An instrument is called negotiable when the *legal* right to the property secured by it passes by its delivery, because, although an instrument may be saleable in the market and treated in many respects like cash, yet if by a transfer of it nothing pass but a right to sue upon it in the name of the transferor or original party to it, such an instrument is not, properly speaking, negotiable." (11th ed. 473.)

An instrument may become negotiable by Act of Parliament, or by the ancient (*Crouch* v. *Credit Foncier*, L. R. 8 Q. B. 374) or modern (*Goodwin* v. *Roberts*, 44 L. J. Ex. 157; *Bechuanaland Co.* v. *London Trading Bank*, 1898, 67 L. J. Q. B. 986; *Edelstein* v. *Schuler*, 1902, 71 L. J. K. B. 572) general of merchants.

The list of English instruments which are negotiable includes bank notes, bills of exchange, promissory notes, cheques, dividend warrants, East India bonds, exchequer bills to bearer, warrants, and debenture bonds to bearer. As to foreign instruments—(1) if proved to be negotiable in the country of origin, they are negotiable here; (2) if proved to be not negotiable in the country of origin, they are the same here; (3) in the absence of evidence as to the law of the country of origin, they are negotiable here if evidence shows they are in fact so treated and they are payable to bearer (*Picker* v.

London and County Bank, 56 L. J. Q. B. 299). A post office order (*Fine Art Society* v. *Union Bank*, 56 L. J. Q. B. 70), a postal order, a cheque crossed not negotiable, and a bill of exchange or promissory note or cheque which is payable to order and is transferred without indorsement (*Good* v. *Walker*, 61 L. J. Q. B. 736) are not negotiable instruments.

A bill of lading is not strictly a negotiable instrument, for an assignee thereof does not acquire proprietary rights independently of his assignor's title, though a *bonâ fide* assignee for value without notice of a vendor's right of *stoppage in transitu* is relieved from liability to that (see *post*, p. 68). The rights of an indorsee of a bill of lading are conferred by the Bills of Lading Act 1855 (18 & 19 Vict. c. 111), and under that statute he may sue in his own name. (See further hereon, Indermaur's "Principles of Common Law," 9th ed. 204.) A dock-warrant is not a negotiable instrument, though now, by the Factors Act (see *post*, p. 68), a person obtaining a dock-warrant without notice will gain a better title than another person claiming prior to him, and can sue in respect of the goods.

It must be borne in mind that the principle of the case of *Miller* v. *Race* does not extend to an overdue bill or note, for a person to whom such an instrument is transferred takes it subject to all its equities. It has, however, been decided that this rule does not primarily apply to cheques (*London and County Banking Co.* v. *Groome*, 8 Q. B. D. 278; 51 L. J. Q. B. 224); but if a cheque has been overdue an unreasonable length of time, then it does (45 & 46 Vict. c. 61, sect. 36 (3), 73). Also note that if a cheque is crossed "not negotiable," a person to whom it is transferred can never gain a better title than the transferor himself had (45 & 46 Vict. c. 61, sect. 81). As to the crossing of cheques generally, specially, or not negotiable, see 45 & 46 Vict. c. 61, sects. 76–82.

It will be observed that for the principle of *Miller* v. *Race* to apply, it is necessary not only that the transfer should have been *bonâ fide*, but also for value. As to what will be a sufficient consideration, the case of *Currie* v. *Misa* (1 App. Cas. 554;

45 L. J. Ex. 852) decided, that a pre-existing debt due to the holder of a negotiable instrument is a sufficient consideration for its having been handed to him, just as much as if it had been money paid down. And now the Bills of Exchange Act 1882 provides as follows :—" Valuable consideration for a bill may be constituted by (1) any consideration sufficient to support a simple contract; (2) an antecedent debt or liability, and such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time" (45 & 46 Vict. c. 61, sect. 27).

The case of *Bank of England* v. *Vagliano* (1891, A. C. 107, 60 L. J. Q. B. 145) may here conveniently be noticed. The plaintiff was a large merchant. His clerk from time to time put before him fraudulent bills, which he accepted, believing them to be genuine, such bills purporting to be drawn by one Vucina with whom the plaintiff had constant dealings, but Vucina's signature being really forged by the clerk. The clerk also forged the indorsement of the person in whose favour the bills were drawn, who was an actually existing person; and he thus became possessed of forged bills with genuine acceptances. The Bank were duly advised of these bills and paid them from time to time, and they in due course, when paid, were debited to the plaintiff in his pass-book. The plaintiff ultimately discovered the frauds, and the clerk was prosecuted and convicted, and the plaintiff sued to recover the amount of these fraudulent bills. He succeeded in the first instance, and also before the Court of Appeal, but the House of Lords reversed these decisions, and held that the plaintiff was guilty of negligence immediately connected with the transactions so as to disentitle him to recover; also that the Bank was protected by sect. 3 (7) of the Bills of Exchange Act 1882, which provides that where the payee is a fictitious or non-existent person, the bill may be treated as payable to bearer. The House of Lords held that the payee is "fictitious" when he is named by way of pretence only, and without the intention that he shall be the person who is to receive payment, and that it makes no difference whether the name of such

person is that of an existing person or not. This decision was followed and applied in *Clutton* v. *Attenborough* (1895, 2 Q. B. 306).

If A. signs his name on a stamped paper which is then stolen from him and filled up as a bill or note and put into circulation, A. incurs no liability to a holder in due course (*Baxendale* v. *Bennett*, 47 L. J. C. P. 624; Bills of Exchange Act 1882, s. 20). And if A. applies to B. for a loan of £15 and gives B. a paper stamped with a ninepenny bill stamp (which would cover £75) and his signature on it and with authority for B. to fill it up for £15, and B. fills up the paper as a promissory note for £30 payable to C. and gets the £30 from C. and misappropriates it, A. is not liable to C. on the note, for C. as original payee cannot be a holder in due course to whom the note has been negotiated after completion (*Hardman* v. *Wheeler*, 71 L. J. K. B. 270; Bills of Exchange Act 1882, s. 20). But if A. pays a promissory note and leaves it in the possession of the holder and he fraudulently puts it into circulation, A. will have to pay it over again to a holder in due course (*Nash* v. *De Freville*, 1900, 69 L. J. Q. B. 484).

WIGGLESWORTH v. DALLISON.

(*N. L. C., Vol. I. p.* 545.)

(1779—1 *Dougl.* 201.)

Decided :—That a custom that the tenant of land, whether by parol or deed, shall have the away-going crop, after the expiration of his term, is good, if not repugnant to the lease under which the tenant holds.

Notes.—But if the lease contains certain stipulations as to the mode of quitting, then, of course, that ousts the custom, and the terms in the lease prevail, which is in accordance with the maxim, "*Expressum facit cessare tacitum.*" It may be stated as a general rule, that whenever there is any certain well-known and established usage or custom, and parties contract on a matter connected with it, they will be presumed to have intended to make such usage or custom a part of their contract, and it will be deemed to be incorporated therewith, unless there is anything in the express contract to exclude its application.

If a person is not aware of the existence of a custom, and such custom is unreasonable or contrary to law, he will not be deemed to have contracted with regard to it, and will not be bound by it, unless at the time he knew of it and expressly or impliedly agreed to be bound by it (*Sweeting* v. *Pearce*, 9 W. R. 343; *Perry* v. *Barnett*, 15 Q. B. D. 388; 54 L. J. Q. B. 466).

It is enacted by the Sale of Goods Act 1893 (56 & 57 Vict. c. 71, sect. 55), that where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by usage, if the usage be such as to bind both parties to the contract.

KEECH v. HALL.

(*S. L. C.*, *Vol. I. p.* 511.)

(1778—1 *Dougl.* 21.)

—That a mortgagee may recover in ejectment *without giving notice to quit*, against a tenant claiming under a lease from the mortgagor made after the mortgage without the privity of the mortgagee.

MOSS v. GALLIMORE.

(*S. L. C.*, *Vol. I. p.* 514.)

(1780 1 *Dougl.* 279.)

ul:—That a mortgagee, after giving notice of the mortgage to a tenant in possession under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues after, and he may distrain for it after such notice.

Notes on these two Cases.—It is well to observe carefully the different results arising from these two cases. The mortgagor having mortgaged his property cannot himself (subject to the provisions of the Conveyancing Act 1881, presently mentioned) grant a valid lease, and any such lease is in fact a nullity, and being so the mortgagee can of course avoid it altogether. But if the mortgagor before the mortgage made a lease, that is perfectly good, and the mortgagee cannot

avoid it, but to obtain the full benefit of his security he can give notice to the tenant, and obtain not only accruing rents, but also rent in arrear, towards liquidation of the amount due on his security. The Judicature Act 1873, though it does not alter this point, contains an important provision as to mortgagors' powers, viz., that a mortgagor entitled for the time being to possession, or to receipt of the rents, of any land as to which the mortgagee has given no notice of his intention to take possession, may sue for such possession, or for recovery of the rents and profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person (36 & 37 Vict. c. 66, s. 25 (5)). This provision does not enable a mortgagor, who is in receipt of the rent under a lease made before the mortgage, to recover possession of the land from the lessee under a proviso for re-entry contained in the lease, for only the mortgagee as legal reversioner can elect to enforce or waive such forfeiture (*Mathews* v. *Usher*, 69 L. J. Q. B. 856).

The different remedies which a mortgagee has, after default, to obtain payment of his mortgage money are as follows:— (*a*) Ejectment against the mortgagor and his tenants since the mortgage (except now tenants holding under leases made on or since Jan. 1, 1882, under the Conveyancing Act 1881), as decided in *Keech* v. *Hall*. (*b*) Suing on bond or covenant. (*c*) Obtaining rents from tenants prior to the mortgage (or since, if holding under leases under the Conveyancing Act 1881), by giving notice, as decided in *Moss* v. *Gallimore*. (*d*) Selling under the power of sale in mortgage deed, or under the power given by the Conveyancing Act 1881 (44 & 45 Vict. c. 41). (*e*) When in possession, cutting timber if the security is insufficient, and now under the Conveyancing Act 1881 (s. [illegible] in any event if the mortgage is made on or since Jan. 1, if in possession, and the timber is ripe for cutting. (*f*) Foreclosing. If a mortgagee forecloses and then sues, the effect of suing is to reopen the foreclosure and give the mortgagor a

renewed right to redeem ; and therefore if a mortgagee forecloses and then sells, he cannot afterwards sue, because he no longer has the mortgaged estate ready to be restored to the mortgagor should he choose to redeem (*Lockhart* v. *Hardy*, 9 Beav. 849). But although this is so, yet a mortgagee, after selling *under his power of sale*, may sue on the covenant to pay (*Rudge* v. *Rickens*, 28 L. T. 537).

A mortgagee may exercise his different remedies as he pleases, even concurrently. A mortgagee will not be entitled generally to add to his mortgage debt sums expended at his own motion for general improvement, but he will be allowed to add sums expended for necessary repairs, protecting the title, or renewing renewable leaseholds ; and if a mortgagee whilst in possession has expended money in improving the property, in an action by the mortgagor to redeem, or after sale for accounts, the mortgagee is entitled to an inquiry whether the outlay has increased the value of the property, and if it has done so he is entitled to be repaid his expenditure so far as it has increased such value (*Shepard* v. *Jones*, 21 Ch. D. 469.) Neither a mortgagee nor mortgagor is actually bound to renew a renewable leasehold in the absence of contract so to do.

The Conveyancing Act 1881 (44 & 45 Vict. c. 41) contains an important provision with regard to leases by either mortgagor or mortgagee. It enacts (sect. 18) that either a mortgagor in possession or a mortgagee in possession can make an agricultural or occupation lease for not exceeding twenty-one years, and a building lease for not exceeding ninety-nine years. Such lease is to take effect within twelve months from its date ; to be at the best rent that can be obtained ; without fine ; to contain a covenant for payment of rent ; and a condition of re-entry on non-payment for not exceeding thirty days ; and a counterpart to be executed by the lessee and delivered to the lessor. Building leases must be in consideration of houses or buildings having been erected or improved or repaired, or to be erected or improved or repaired within five years from date, and a nominal or less rent than that ultimately

payable may be reserved for the first five years or any part thereof. A mortgagor leasing under this provision must, within one month of making the lease, deliver to the mortgagee (or where more than one, then to the mortgagee first in priority) a counterpart of the lease duly executed by the lessee; and upon default the mortgagee's power of sale arises at once, although the lease is in no way invalidated. All this is subject to the express provisions of the mortgage deed, and *applies only to mortgages made after* 1881, unless otherwise agreed. The Act enables a mortgagor to lease part of the property with sporting rights over the remainder (*Brown* v. *Peto*, 69 L. J. Q. B. 869). When the mortgagor makes the lease, the mortgagee on giving notice to the tenants can enforce the covenants and conditions in the lease as reversioner (*Municipal Building Society* v. *Smith*, 58 L. J. Q. B. 61), and is bound by the lessor's covenants (*Wilson* v. *Queen's Club*, 60 L. J. Ch. 689).

The Tenants' Compensation Act 1890 (53 & 54 Vict. c. 57, sect. 2) protects a tenant occupying land under a contract of tenancy with the mortgagor, which is not binding on the mortgagee, by requiring the mortgagee to give him six months' notice to quit, and to pay the same tenant-right valuation on quitting as the mortgagor would have had to pay.

If a mortgagor is in personal occupation of the property, the mortgage deed usually contains an attornment clause by which the mortgagor acknowledges himself tenant of the mortgagee. This clause does not need to be in the statutory form of a moneylender's bill of sale (*Green* v. *Marsh*, 1892, 2 Q. B. 330), but it gives no power to distrain for the interest unless it is duly registered under sect. 6 of the Bills of Sale Act 1878. But though unregistered, it enables the mortgagee to specially indorse his writ in an action to eject the mortgagor (*Mumford* v. *Collier*, 25 Q. B. D. 279).

The proper remedy of an equitable mortgage as regards the land is foreclosure (*James* v. *James*, L. R. 16 Eq. 153; 42 L. J. Ch. 386; *Oldham* v. *Stringer*, 33 W. R. 251); and if accompanying the deposit of deeds there is a memorandum containing an agreement to execute a legal mortgage, then he

may come to the Court either for foreclosure or sale (*York Union Bank* v. *Artley*, 11 Ch. D. 205). And in any foreclosure suit, the Court has power in its discretion to direct a sale instead of a foreclosure (Conveyancing Act 1881, s. 25). (See further hereon, Indermaur's "Manual of Equity," 5th ed. pp. 198, 199.)

MOSTYN v. FABRIGAS.

(1775—*Cowp.* 161.)

This was an action against the Governor of Minorca for trespass and false imprisonment in Minorca, and after verdict for the plaintiff, the principal question on a bill of exceptions was whether any action could be maintained by a native of Minorca for an injury committed there. *Decided*:—That the action would lie, being of a transitory nature, but that if it had been strictly local no action could have been maintained in England.

Notes.—*Local* actions are those founded on some cause of action which necessarily refers to some particular locality; *transitory* actions are those founded on a cause of action which might take place anywhere. The cause of action in the above case was transitory, and therefore the action was held maintainable. Our Courts refuse to try questions of a local nature affecting property abroad, *e.g.*, trespass to land or ejectment actions, or to adjudicate upon a claim of title to foreign land in proceedings founded on the alleged invasion of the proprietory rights attached to it, and to award damages founded on that adjudication. No action of this kind can be maintained here, although both plaintiff and defendant are domiciled here (*British South Africa Co.* v. *Companhia di Moçambique*, 1893, A. C. 602; 63 L. J. Q. B. 70). But our Courts here have jurisdiction acting *in personam* to decree specific performance of an agreement relating to lands abroad, if the parties are

here (*Penn* v. *Baltimore*, Indermaur's "Epitome of Conveyancing and Equity Cases").

An action to recover damages for a tort committed abroad lies in England, provided (1) defendant is in England to be sued, (2) the matter complained of is actionable by English law, *The Halley*, 37 L. J. Ad. 33, (3) it is wrongful in the place where committed, *Machado* v. *Fontes*, 66 L. J. Q. B. 542, and (4) it is a tort to person or goods and not to land, *supra*.

It is convenient to here notice the law as to venue or place of trial of an action. Prior to the Judicature practice, the rule was that if the action was a local one, such as an action of trespass to land, the venue must be laid in the place where the cause of action arose; but if the action was transitory, such as an action for debt, the plaintiff might lay the venue where he chose. This distinction as to venue has ceased to exist since 1875, and the subject is now governed by Order 36, rule 1, which provides that there shall be no local venue for the trial of any action except where otherwise provided by statute (passed since 1875, *Buckley* v. *Hull Dock*, 1893, 2 Q. B. 93); but in every action in every Division of the High Court the place of trial shall be fixed by the Court or a Judge.

LICKBARROW v. MASON.

(*S. L. C., Vol. I. p.* 693.)

(1788—2 *T. R.* 63.)

Decided:—That the consignor of goods may stop the goods *in transitu* before they get into the hands of the consignee on hearing of the bankruptcy or insolvency of the consignee; but if the consignee has assigned the bill of lading to a third person for a valuable consideration *bonâ fide* without notice, the right of the consignor is gone.

Notes.—"Stoppage *in transitu*" is a prevention of wrong by a mere personal act, consisting in the right which a vendor, having sold goods on credit, has to stop them on their way to the vendee, *before they have reached him*, on his becoming bankrupt or insolvent. The law on this subject is now codified by the Sale of Goods Act 1893 (56 & 57 Vict. c. 71). That Act provides (sect. 39) that, notwithstanding the property in goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law, in case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with possession of them. A seller is deemed to be unpaid when the whole of the price has not been paid or tendered, or when a bill of exchange or other negotiable instrument has been received as conditional payment and the condition has not been fulfilled (sect. 38); and a buyer is to be deemed insolvent when he has either ceased to pay his debts in the ordinary course of business, or cannot pay them as become due, whether he has committed an act or not (sect. 62). The Act also (sect. 45) specially deals with

the point of when goods are to be deemed in course of transit, and when the transit is to be considered as having come to an end. Of course, if the goods have actually reached the vendee, or an agent on the part of the vendee, then the right is gone, as the very name "stoppage *in transitu*" imports. It may be stated generally that the goods are "*in transitu*" so long as they are in the hands of the carrier as such, whether he was or was not appointed by the consignee, and also so long as they remain in any place of deposit connected with their transmission; but that if after their arrival at the place of destination they be warehoused with the carrier, whose stores the vendee uses as his own, or even if they be warehoused with the vendor himself, and rent be paid for them, that puts an end to the right to stop "*in transitu*." It is not necessary, in exercising the right of stoppage *in transitu*, that the vendor should actually seize the goods, for notice to the carrier or other forwarding agent is enough (56 & 57 Vict. c. 71, sect. 46).

The above case shows how the right of stoppage *in transitu* may be lost, although the goods are still in course of transit. In addition, it is enacted by the Sale of Goods Act 1893 (sect. 47), that where a "document* of title" to goods has been lawfully transferred to the buyer, and he transfers such document to a person who takes the same in good faith and for valuable consideration, then if such last-mentioned transfer was by way of sale the seller's right is defeated, and if by way of pledge or other disposition for value, the seller's right can only be exercised subject to the rights of the transferee. If the buyer pledges the bill of lading and goods of his own, the seller can marshal the assets and have the buyer's own goods exhausted before those comprised in the bill of lading (*Re Westzinthus*, 5 B. & Ad. 817).

The exercise of the right of stoppage *in transitu* does not

* This expression includes any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, &c. (Factors Act 1889, sec. 1; Sale of Goods Act 1893, sec. 62).

rescind the contract of sale (Sale of Goods Act 1893, sect. 48), but is defined as a right to resume possession of the goods as long as they are in course of transit and retain them until payment or tender of the price (*ibid.* sect. 44). But the seller may re-sell if the goods are perishable, or where he has given notice of his intention to re-sell, or where he has reserved a right to re-sell; and even if the seller re-sells, having no right to do so, yet a buyer taking *bonâ fide* without notice, acquires a good title against the original buyer (*ibid.* sect. 48).

PIGOT'S CASE.

(1615—11 *Rep. at fol.* 27A.)

Decided:—That if an obligee himself alters a deed, either by interlineation, addition, erasing, or by drawing a pen through the line, &c., although it is in words not material, yet the deed is void; but if a stranger without his privity alters the deed by any of the said ways in any points not material, it shall not avoid the deed.

MASTER v. MILLER.

(*S. L. C., Vol. I. p.* 767.)

(1791—4 *T. R.* 320.)

—That an unauthorised alteration in a bill of exchange after acceptance, whereby the payment would be accelerated, avoids the instrument, and no action can be maintained upon it, even by an innocent holder for valuable consideration.

ALDOUS v. CORNWELL (1868)

(*L. R.* 3 *Q. B.* 573.)

(37 *L. J. Q. B.* 201.)

Here a promissory note made by defendant expressed no time for payment, and while it was in the possession

of the payee (the plaintiff) the words "on demand" were added without the assent of the maker. This action was now brought on the note, and the defendant pleaded that he did not make it. *Decided*:—That as the alteration only expressed the effect of the note as it originally stood, and was therefore immaterial, it did *not* affect the validity of the instrument.

Notes on these three Cases.—*Pigot's Case* related only to deeds, but *Master* v. *Miller* extended its doctrine, as far as regarded material alterations, to bills of exchange, and subsequent cases have applied it indiscriminately to all written instruments, whether under seal or not. However, *Pigot's Case* is not now entirely good law, for such an immaterial alteration in a deed or other writing as filling in a date where a blank is left, though done by the party, does *not* at all vitiate it. *Aldous* v. *Cornwell* is cited as plainly showing that a mere immaterial alteration in a negotiable instrument does *not* affect it. The case of *Master* v. *Miller* must now be considered in connection with the provision on the subject of alterations in bills, notes, and cheques, contained in the Bills of Exchange Act 1882. This statute provides that where any such instrument is materially altered without the assent of all parties liable thereon it is avoided, except as against a party who has himself made, authorised or assented to the alteration, and subsequent indorsers: provided, however, that where the instrument has been materially altered, but the alteration is not apparent, and the instrument is in the hands of a holder in due course, such holder may avail himself thereof, as if it had not been altered, and may enforce payment of it according to its original tenor (45 & 46 Vict. c. 61, sect. 64 (1). See hereon *Scholfield* v. *Earl of Londesborough*, *ante*, p. 47).

As to what will be a material alteration, reference may be made to *Suffell* v. *Bank of England* (9 Q. B. D. 555; 51 L.J.Q.B. 401), deciding that the alteration of a Bank of England note,

by erasing the number upon it, and substituting another, is a material alteration, which avoids the instrument. Note also that the provision in the Bills of Exchange Act 1882, above referred to, as to the effect of alterations which are not apparent, does not apply to Bank of England notes (*Leeds and County Bank* v. *Walker*, 11 Q. B. D. 84; 52 L. J. Q. B. 590).

WAUGH v. CARVER.

(1794—2 *H. Blackstone*, 235.)

Here certain ship agents at different ports entered into an agreement to share in certain proportions the profits of their respective commissions, and the discount on the bills of tradesmen employed by them in repairing the ships consigned to them, &c. *Decided*:—That by this agreement they became liable as partners to all persons with whom either contracted as such agents, though the agreement provided that neither should be answerable for the acts or losses of the other, but each for his own; for he who takes the general profits of a partnership must of necessity be made liable to the losses, and he who lends his name as a partner becomes as against all the world a partner.

COX v. HICKMAN.

(1860 8 *H. L. Ca.* 268.)

Here S. & S. becoming embarrassed had executed a deed assigning their property to trustees whom they empowered to carry on the business under the name of the Stanton Iron Company, and do all necessary acts, with power to the majority of the creditors assembled at a meeting to make rules for conducting the

business, or to put an end to it, and after the debts had been discharged the property was to be re-transferred by the trustees to S. & S. Two of the creditors, C. and N., were named amongst the trustees; C. never acted; N. acted for six weeks and then resigned, Some time afterwards the other trustees who continued to carry on the business became indebted to H., and gave him bills accepted by themselves "per proc. the Stanton Iron Company." *Held*:—That there was no partnership created by the deed, and that consequently C. and N. could *not* be sued on the bills as partners in the company.

WALKER v. HIRSCH (1884).

(27 *Ch. Div.* 460.)

(54 *L. J. Ch.* 315.)

(32 *W. R.* 992.)

In this case the plaintiff had been a general clerk of the defendants, and by an agreement made in 1883 it was arranged that, instead of his former position, he should receive a salary of £180 a year, and in addition one-eighth share of the net profits, and that he should bear one-eighth part of the losses of the business. He was also to put £1500 in the business at 5 per cent. interest, and this arrangement was to continue in force until after notice in writing from either side. The plaintiff was never introduced to customers as a

partner, and he continued apparently to occupy the same position, and to in fact perform the same duties as before. On disputes arising, the defendant gave notice determining the arrangement, and excluded the plaintiff from the office; and this action was brought for a declaration that the plaintiff was a partner, for the winding up of the partnership affairs, and for an injunction to restrain the defendant from excluding him from the premises, and from dealing with the partnership assets, and for a receiver.

Decided:—That there was no partnership existing. That the question of partnership depended upon the intention of the parties, and it appeared clear that the intention was that the plaintiff should only remain a clerk to the defendant.

on these three Cases.—The law of partnership was codified by the Partnership Act 1890 (53 & 54 Vict. c. 39), and the student is referred to it. Partnership is by that Act (sect. 1) defined as the relation subsisting between persons carrying on a business in common with a view of profit, but does not include a company or association which is (*a*) registered under the Companies Act 1862, or (*b*) formed under any other statute or letters patent or royal charter, or (*c*) working mines in the Stannaries. See also, further rules for determining the existence of a partnership in sect. 2, and in particular observe that by subsection 3, although receipt of profits is *primâ facie* evidence of partnership, yet it does not of itself make the recipient a partner, and in particular, (*a*) receipt of a debt by instalments or otherwise out of accruing profits, (*b*) remuneration of a servant or agent by a share of profits, (*c*) receipt by a widow or child of a dead partner of a portion of profits by way of annuity, (*d*) loan of money on a contract signed by all parties

that the lender shall receive interest varying with the profits, or a share of the profits, or (*e*) receipt of a portion of profits (*Re Giere*, 80 L. T. 737) in consideration of the sale of goodwill, does not of itself create either the rights or the liabilities of a partner. But by section 3 it is provided as regards cases (*d*) and (*e*) above mentioned—*i.e.*, the lender and the vendor of a goodwill on such terms—they are both postponed to all other creditors for value if the borrower or buyer is adjudged bankrupt, or arranges to pay less than 20*s.* in the £, or dies insolvent.

The principal cases above quoted must be regarded thus:—*Waugh* v. *Carver* shows the old idea that community of profits constituted a partnership, and is not now law. *Cox* v. *Hickman*, in fact, demonstrates this, and shows that the question of partnership or not turns on intention, and *Walker* v. *Hirsch* shows this much more forcibly. Now we have the Partnership Act 1890, but that only lays down general principles, and *Cox* v. *Hickman* and *Walker* v. *Hirsch* are still useful cases, as illustrative of what will and what will not be deemed to constitute a partnership.

A dormant partner is one who, though not appearing as a partner, yet in reality is one, and he is liable in common with other partners. A nominal partner is one who, without participating in the profits, yet lends his name to the firm, and he is liable to third parties if his holding himself out as a partner has come to their knowledge, and they gave credit upon the strength of his name. Though partners are jointly interested, yet, on the death of one his share forms part of his own personal estate, and though on the death of one the legal interest in choses in action survives to the others, yet they are in equity but constructive or implied trustees of the share of the deceased partner. The power of one partner to bind the other or others depends on the ordinary principles of agency, and in the same way that a general agent binds his principal by all contracts coming within the scope of his agency, so one partner binds the other or others by all such transactions as are within the scope of the partnership dealings, though the partners may have privately agreed that no such power shall

exist. Thus, in mercantile partnerships one partner can bind the others by a bill of exchange; but one member of a firm of solicitors would have no such power, though he could bind his partners by drawing a cheque in the name of his firm, notwithstanding that the articles of partnership provided that all cheques should be signed by not less than two partners, for the drawing of cheques comes within the scope of any ordinary partnership business; but this does not apply to a post-dated cheque, which must in effect be considered as a bill payable so many days after date (*Forster* v. *Mackreth*, L. R. 2 Ex. 163). A partner cannot bind his firm by a deed unless he is authorised by deed so to do; nor by giving a guarantee; nor by submitting a dispute to arbitration. A partner is not liable on contracts entered into before he became a member of the firm. (See generally hereon 53 & 54 Vict. c. 39, sects. 5 18.)

A partnership may be dissolved: —

1. If for a fixed term, by expiration thereof.
2. If for a single adventure, or undertaking, by the termination thereof.
3. If for an undefined time, by notice.
4. By death.
5. By bankruptcy.
6. At the option of the others, by the share of a partner being seized for his separate debt.
7. By any event which makes it unlawful for the business to be carried on, or for the members of the firm to carry it on in partnership.
8. By judgment of the Court, which may be on any of the following grounds: (*a*) If a partner is found lunatic by inquisition: (*b*) If a partner other than the partner suing becomes in any way permanently incapable of performing his part of the contract; (*c*) If a partner other than the partner suing has been found guilty of such conduct as the Court thinks, having regard to the nature of the business, is calculated to prejudicially affect the carrying on of the business; (*d*) If a partner other than the

partner suing wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in partnership matters that it is not reasonably practicable for the other partners to carry on the business in partnership with him; (*e*) If the business can only be carried on at a loss; (*f*) If circumstances arise which in the opinion of the Court render a dissolution just and equitable (53 & 54 Vict. c. 39, sects. 32–35).

FLETCHER v. RYLANDS.

(*S. L. C., Vol. I. p.* 810.)

(*L. R.* 1 *Ex.* 265; *L. R.* 3 *H. L.* 330.)

The plaintiff in this case was possessed of certain mines and veins of coal, which communicated with certain old coal workings under the defendants' land. The defendants were not aware of these old workings under their land, and they constructed on their land a reservoir. The reservoir was properly constructed, but as soon as it was filled with water it gave way, by reason of the cavities beneath, and the water found its way into and flooded the plaintiff's mines. *Decided*:—That the defendants were liable in that, though not guilty of negligence, they had brought on to their land what was likely to do mischief if it escaped, and it was therefore there at the defendants' peril.

Notes.—Every man may use his own lands as he thinks fit for any lawful purpose, subject only to the maxim, *Sic utere tuo ut alienum non laedas* (use your own rights so that you do not hurt those of another). The defendants were quite entitled to collect water on their land, but it was at their risk. So equally a man is entitled to collect wild animals on his land, but they are there at his risk, and he is liable if they escape and do injury. The case of *Ballard* v. *Tomlinson*, referred to in a previous note (*ante*, p. 33), is also very illustrative of the same principle. See also *Crowhurst* v. *Amersham Burial Board* (4 Ex. D. 5; 48 L. J. Q. B. 109), where the owner of the

land had thereon a yew-tree, the branches of which projected on to his neighbour's land, and the neighbour's horse ate some of the leaves and was poisoned thereby, and the owner of the land on which the tree was growing was held liable. But where the same thing happened, except that the branches of the yew-tree did not project, but the plaintiff's horse reached over the fence and ate the leaves, it was held that the defendant was not liable (*Ponting* v. *Noakes*, 1894, 2 Q. B. 281; 63 L. J. Q. B. 549).

If thistles grow naturally on any land and the seeds blow on to my neighbour's land and do damage, I am not liable (*Giles* v. *Walker*, 29 Q. B. D. 656).

A person who stores electricity which escapes and does harm is liable (*South African Telegraph Co.* v. *Cape Town Tramways*, 1902, A. C. 381), unless he acts under statutory powers and is guilty of no negligence (*National Telephone Co.* v. *Baker*, 62 L. J. Ch. 699).

A person who keeps an animal of the class *feræ naturæ* keeps it at his peril, *e.g.*, an elephant (*Filburn* v. *People's Palace Co.*, 59 L. J. Q. B. 471), a monkey (*May* v. *Burdett*, 9 Q. B. 101). But if the animal is of the class *domitæ*, either scienter or negligence must be proved, except where a dog bites cattle, sheep, or horses (28 & 29 Vict. c. 60)

The above principal case should be compared with and distinguished from *Nichols* v. *Marsland* (2 Ex. D. 1; 46 L. J. Ex. 174). In that case an escape of water that had been collected on the defendant's land occurred from the effects of a flood which could not reasonably have been anticipated, and it was held that the defendant was not liable, on the principle that what occurred was really *vis major*. Further, in *Box* v. *Jubb*, 48 L. J. Ex. 417, the owner of a reservoir who had used all reasonable means to prevent water escaping, was held not liable for an escape due to the act of a third person which he could not control or prevent.

CUTTER v. POWELL.

(*S. L. C., Vol. II. p.* 1.)

(1795—6 *T. R.* 320.)

Here the defendant gave to one Cutter deceased, a note as follows:—"Ten days after the ship *Governor Parry*, myself master, arrives at Liverpool, I promise to pay to Mr. T. Cutter the sum of thirty guineas, provided he proceeds, continues, and does his duty as second mate in the said ship from hence to the port of Liverpool. Kingston, July 31, 1793." Cutter died during the voyage, and this action was brought by his representatives. *Decided*:—That deceased not having proceeded, continued, and done his duty for the whole voyage, nothing could be recovered by his representatives.

Notes.—The general rule is that while the special contract remains unperformed, no action of *indebitatus assumpsit* can be brought for anything done under it. Thus it has been held that where there is a contract to do specific work upon certain premises for a sum payable on completion of the work, and before completion the premises are destroyed without fault on either side, though further performance of the contract is excused, yet no action lies for the work actually done (*Appleby* v. *Myers*, L. R. 2 C. P. 651).

But if a special contract has been abandoned or rescinded by the parties, then an action will lie for what has been done, by the person suing on a *quantum meruit*—that is, for as much as

it is worth; and if A. and B. enter into a special contract, and A. refuses to perform his part of it, or renders himself absolutely unable to do so, it is open to the other party to at once rescind such special contract, and immediately sue on a *quantum meruit* for whatever he has done under the contract previously (see *Planché* v. *Colburn*, 8 Bing. 14).

BICKERDIKE v. BOLLMAN.

(*S. L. C., Vol. II. p.* 102.)

—That notice of dishonour of a bill is not necessary if the drawer had no effects in the hands of the drawee, so that he could not be injured for want of notice.

Notes.—The result of this decision may be illustrated thus: A. draws a bill on B., who accepts it for A.'s accommodation, and on presentment to B. for payment the bill is dishonoured; to entitle the holder to sue A. (the drawer), it is *not* necessary to give him any notice of dishonour, because, as he had no assets in B.'s hands, he cannot possibly be injured. Were it an ordinary acceptance, of course the drawer could not be sued unless notice of dishonour was duly given to him. But it has been decided that the principle of this case must not be extended, and notice must be given if the drawer have reason to expect that some third party will provide for payment of the bill; and if the drawer had effects in the drawee's hands at the time when the bill was drawn, he does *not* lose his right to notice, although before the time of payment he may have ceased to have any.

Although this case is still left standing in this edition, it must be borne in mind that the subject of Bills of Exchange is now entirely governed by the Bills of Exchange Act 1882 (45 & 46 Vict. c. 61). See sections 46 to 50 and 72. By section 48 if a bill is dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and to each indorser or he will be discharged; but the omission to give notice of dishonour by non-acceptance shall not

prejudice the rights of a subsequent holder in due course; and after notice of dishonour by non-acceptance, notice of dishonour by non-payment is not necessary unless the bill has meantime been accepted. By section 49 notice of dishonour must be given in accordance with the fifteen rules in that section in order to be valid and effectual. Section 50 of the Act provides that notice of dishonour shall be dispensed with: (*a*) where notice cannot be given or does not reach the party, (*b*) where the giving of notice is either antecedently or subsequently waived; (*c*) As regards the drawer in the following cases: (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) *where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill*, (5) where the drawer has countermanded payment; (*d*) As regards the indorser, in the following cases: (1) where the drawer is a fictitious person, or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation. The position expressed in the italicised lines above includes the case of *Bickerdike* v. *Bollman*.

When notice of dishonour is necessary, the time for giving it when the person lives at or near the place of dishonour, or where the giver of notice himself received notice, is such a time that it may be received by the expiration of the day after the dishonour, or after the time when the giver of the notice himself received notice, for each indorser "has his day" for giving notice. When the person is not living at or near the place, it is enough to give notice by the post of the next post day, or when it is a foreign bill by the next ordinary conveyance. When the bill is at a banker's, the banker has a day to give notice to his customer, and the customer another day to give notice to the prior parties.

A cheque should be presented for payment within a reason-

able time, which means ordinarily by the day after the day of its receipt, or, if the parties live at a distance, forwarded for presentment within that time. Where a cheque is not presented for payment within such reasonable time, and the drawer or person on whose account it is drawn had the right at the time of presentment, as between him and the banker, to have the cheque paid, and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid. But the holder of such cheque as to which such drawer or person is so discharged is a creditor of the banker in lieu of such drawer or person to the extent of such discharge, and is entitled to recover the amount from him (45 & 46 Vict. c. 61, sect. 74).

I'ANSON v. STUART.

(1785—1 *T. R.* 748.)

—That to print of any one that he is a swindler, is a libel and actionable, for it is not necessary, in order to maintain an action for libel, that the imputation should be one which if spoken would be actionable as a slander.

—The legal point to remember in this case is that writing may constitute a cause of action as a libel, when the words if only spoken would not, without proof of special damage. Words which are slanderous in themselves, *i.e.*, will support an action without any proof of special damage, are words which impute, (1) some offence punishable by the criminal law, or that a man has been actually convicted; or (2), some misconduct or incapacity in the plaintiff's trade, profession, or office; or (3), that the plaintiff actually labours under a contagious or infectious disorder, the imputation of which may exclude him from society; or (4), that impute unchastity or adultery to a woman (54 & 55 Vict. c. 51).

As to what will amount to a publication of a libel, observe *Emmens* v. *Pottle* (16 Q. B. D. 354; 55 L. J. Q. B. 51), deciding that where a newspaper vendor exposed for sale and sold a paper that contained a libel which he was ignorant of, and could not be supposed to know of, he was not liable for publishing a libel. Sending a libel in a letter addressed to the wife of the person libelled is a sufficient publication (*Wenman* v. *Ash*, 22 L. J. C. P. 190); but the delivery of a libellous paper by a husband to his wife, or by a wife to her husband, is not *per se* a publication (*Wenkak* v. *Morgan*, 57 L. J. Q. B. 241). A municipal corporation cannot in its corporate capacity

maintain an action for libel, unless property of the corporation has been injured thereby, when it is probably otherwise (*Mayor of Manchester* v. *Williams*, 1891, 1 Q. B. 94; 60 L. J. Q. B. 23); but a trading corporation or company may maintain such an action in respect of a statement reflecting on its character in the conduct of its business, without proof of special damage (*South Hetton Coal Co.* v. *North Eastern News Association*, 1894, 1 Q. B. 133; 63 L. J. Q. B. 293).

TILLETT v. WARD (1882).

(10 *Q. B. D.* 17.)
(52 *L. J. Q. B.* 61.)
(31 *W. R.* 197.)

An ox belonging to the defendant while being lawfully driven to market through a street in the town of Stamford, escaped, without there being any negligence on the part of the defendant or the drover, into a shop of the plaintiff, an ironmonger, the doorway of which was open to the street, and there did damage.

Decided :—That the defendant was not liable.

—This case was decided upon the principle that there was no evidence of any negligence to render the defendant liable; it belongs in fact to the class of cases involving the point of inevitable accident. No doubt a person must ordinarily keep his cattle from trespassing, and this case furnishes a direct exception to that rule, showing that where a person is using a highway in a proper manner, he is not liable if his cattle trespass on premises immediately adjoining the highway, there being no negligence on the part of the owner of such

It is a clearly-established principle that where an act is what may be termed an inevitable accident, then there is no right of action by the party injured. On this point note the decision in the case of *Vaughan* v. *Taff Vale Ry. Co.* (5 H. & N. 679; 29 L. J. Ex. 247), that a railway company authorised by the legislature to use locomotive engines, is not responsible for damage from fire occasioned by sparks emitted from an engine travelling on the railway, provided the company has taken all

reasonable precautions to prevent injury from fire, and is not guilty of negligence in the management of the engine. The mere fact, however, that the company has not adopted the latest inventions of scientific discovery is not sufficient to render it liable (*National Telephone Co.* v. *Baker*, 1893, 2 Ch. 186; 62 L. J. Ch. 699). But the principle of *Vaughan* v. *Taff Vale Ry. Co.* does not apply to injury done by a steam traction engine being driven along a highway, for it is being thus driven certainly under a statutory permission, but at the party's own risk (*Powell* v. *Fall*, 5 Q. B. D. 597; 49 L. J. Q. B. 428). It has recently been held that even in the case of a steam traction engine, or an electrical tramcar, or anything of a similar character run under statutory authority, if an injury that happens is the natural incident of the exercise of the statutory powers (*e.g.*, a horse being frightened, or a telephone system interfered with by the discharge of an electrical current into the earth), the proprietors are not liable, as such things must be deemed to have been in the contemplation of the legislature when it gave its authority (*National Telephone Co.* v. *Baker*, *supra*).

ABRATH v. NORTH EASTERN RAILWAY

(11 App. Ca. 247; 55 L. J. Q. B. 457; 55 L. T. 63.)

Decided:—That in an action for malicious prosecution, the burden of proof lies on the plaintiff to establish the facts which the jury have to find with a view to the decision of the judge on the question of reasonable and probable cause, namely, whether the defendant took reasonable care to inform himself of the true state of the case, and whether he honestly believed the case which he prosecuted.

Notes.—Malicious prosecution is a tortious act, consisting in the unjust and malicious prosecution of one for a crime, or the unjust and malicious making one a bankrupt without any reasonable or probable cause. The points to be proved in such an action are: 1. Actual malice; 2. The absence of any reasonable or probable cause; and 3. That the prosecution was determined in the plaintiff's favour if from its nature it was capable of being so determined. The above case is on the second point, and shows that it is not for the defendant to excuse himself by showing the reasonable and probable cause, but for the plaintiff to prove the entire absence of anything of the kind. As to the functions of the judge and the jury respectively in such an action, note that it is for the judge to determine as a point of law whether the facts, as found by the jury, do or do not amount to reasonable and probable cause, whilst it is for the jury to deal with the question of malice (see further hereon, Indermaur's "Principles of Common Law," 9th ed. 379–382).

An action for malicious prosecution will lie against a company (*Edwards* v. *Midland Ry. Co.*, 6 Q. B. D. 287; 50 L. J. Q. B. 281; *Cornford* v. *Carlton Bank*, 1899, 68 L. J. Q. B. 196). No action will lie for malicious prosecution of a civil action, but an action will lie for maliciously and without reasonable and probable cause, presenting a petition to wind up a company (*Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q. B. D. 674; 52 L. J. Q. B. 488).

CHANDELOR v. LOPUS.

(*S. L. C., Vol. II. p.* 54.)

(1604—*Cro. Jac.* 4.)

The defendant sold to the plaintiff a stone which he affirmed to be a Bezoar stone, but which proved not to be so. This action was brought upon the case, and it was held that no action lay against the defendant unless he either knew it was not a Bezoar stone, or warranted it to be a Bezoar stone.

PASLEY v. FREEMAN.

(*S. L. C., Vol.*

3 T.

That a false affirmation made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is ground for an action upon the case in the nature of deceit. In such an action it is *not* necessary that the plaintiff should be benefited by the deceit, or that he should collude with the person who is.

Notes on these two foregoing Cases.—These two cases are placed together as being slightly connected; but although this is so, the differences between them are obvious; for the case of *Chandelor* v. *Lopus* touches as well on the point of warranty,

whilst *Pasley* v. *Freeman* only deals with the nature of the false affirmation that will support an action of deceit. A warranty is defined by the Sale of Goods Act 1893 (56 & 57 Vict. c. 71, s. 62) as "an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated." A warranty is sometimes implied, though the general rule on a sale of goods is *caveat emptor*. (See as to when a warranty of quality is implied on the sale of goods, Sale of Goods Act 1893 (sects. 13-15); Indermaur's "Principles of Common Law," 9th ed., 113, 114.) A warranty which is made subsequently to a sale is invalid for want of consideration, unless indeed made upon some fresh consideration (*Roscorla* v. *Thomas*, 3 Q. B. 234).

The decision in *Pasley* v. *Freeman* is now subject to Lord Tenterden's Act (9 Geo. 4, c. 14, s. 6), by which "no action shall be maintained whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person to the intent or purpose that such other person may obtain 'credit, money, or goods upon,' unless such representation or assurance be made in writing signed by the party to be charged therewith." An untrue representation signed by a bank manager in the course of his business does not make the bank liable (*Hirst* v. *West Riding Bank*, 1901, 2 K.B. 560). When the statute applies it adds signed writing to the essentials of an action for deceit.

In considering what is sufficient to enable an action in respect of fraud or deceit to be maintained the case of *Derry* v. *Peek* (14 App. Cas. 337; 58 L. J. Ch. 864) should be particularly observed. In that case it was held that in order to maintain an action for damages for fraud or deceit, the plaintiff must prove either that the defendant knew the representation to be untrue, or did not believe it to be true, or made it recklessly without caring whether it was true or false, and for the purpose of inducing the plaintiff to act upon it; and that

if a statement is honestly believed in, though in fact it is untrue, no action for damages will lie. This statement of the law must, however, as regards representations made in prospectuses of companies, be taken subject to the provisions of the Directors Liability Act 1890 (53 & 54 Vict. c. 64), which makes the persons who issue a prospectus liable in damages for untrue statements contained therein to persons who subscribed for shares on the strength of the prospectus, unless they can prove they reasonably believed the untrue statements were true. (See Indermaur's "Principles of Common Law," 9th ed., 288.)

A warranty must be carefully distinguished from a false representation and also from a condition. A false representation precedes and induces the contract and gives the person to whom it is made a right to repudiate the contract, as also does breach of a condition forming an integral part of the contract. A warranty is made contemporaneously with the contract, and its breach does not vitiate it, but only gives a right to damages. (See Indermaur's "Principles of Common Law," 9th ed., 110.)

CLAYTON v. BLAKEY.

(*S. L. C., Vol. II. p.* 127.)

(1798—8 *T. R.* 3.)

Decided:—That though by the Statute of Frauds (29 Car. 2, c. 3, s. 1) it is enacted that all leases by parol for more than three years shall have the effect of estates at will only, such a lease may be made to enure as a tenancy from year to year.

DOE d. RIGGE v. BELL.

(*S. L. C., Vol. II. p.* 119.)

(1793—5 *T. R.* 471.)

Decided:—That, although a lease is void by the Statute of Frauds (29 Car. 2, c. 3, s. 1), and therefore the tenant holds not under the lease, but as tenant from year to year, yet such holding is governed by the terms of the lease in other respects.

Notes on these two Cases.—The principle upon which the tenancy—which by 29 Car. 2, c. 3, s. 1, is declared, not being created by writing, shall be only at will—is converted into a tenancy from year to year, is, that originally, in accordance with the statute, it is but an estate at will, but afterwards by the payment of rent, or from other circumstances indicative of an intention to create such yearly tenancy, it becomes converted

into a tenancy from year to year, to which latter certain tenancy the Courts always lean in preference to the uncertain tenancy of an estate at will. For the rule to determine when a tenancy is at will, and when for years, see *Richardson* v. *Langridge* (Indermaur's "Conveyancing and Equity Cases," 9th ed., p. 1).

The decision in *Doe* d. *Rigge* v. *Bell*, that the holding is regulated by the other terms of the lease, arises rather as a matter of evidence than of law. In that case the lease itself was void, but the same rule applies to the case of a tenant holding over after the expiration of his term under a valid lease, for in such a case after there has been a payment and acceptance of subsequent rent, the law, in the absence of any evidence to the contrary, implies that he continues to hold on such of the terms of the previous demise as are applicable to a tenancy from year to year.

Where a tenant goes into possession under an agreement for a lease, he is strictly only a tenant at will until he pays rent referable to some aliquot part of a year, and then he becomes a tenant from year to year. But throughout, as long as he performs his part of the stipulations of the agreement, he has an equitable right to the specific performance of the contract, so that he is thus practically in the same position as if a lease had been actually granted (*Walsh* v. *Lonsdale*, 21 Ch. D. 9; 52 L. J. Ch. 2; *Coatsworth* v. *Johnson*, 55 L. J. Q. B. 220; 54 L. T. 220; *Swain* v. *Ayres*, 21 Q. B. D. 289; 57 L. J. Q. B. 428).

ELWES v. MAWE.

(*S. L. C., Vol. II. p.* 189.)

(1802—3 *East*, 38.)

—That although tenants may remove fixtures erected for the purposes of their trades, yet tenants in agriculture cannot remove fixtures erected for the purposes of husbandry.

Notes.—This case is useful to cite on the general principle of fixtures, but the law contained in it is now altered, by the Landlord and Tenant Act 1851 (14 & 15 Vict. c. 25), and the Agricultural Holdings Act 1883 (46 & 47 Vict. c. 61). The first Act (sect. 3) provides that buildings, engines, or machinery erected for agricultural purposes, with the consent in writing of the landlord, shall remain the property of, and be removable by, the tenant, so that he do no injury in the removal thereof; but before removal one month's notice shall be given to the landlord, who has the option of purchasing. The 1883 Act provides by section 34 that the tenant of a farm or market garden may remove any engine, machinery, fencing, fixture, or building for which he cannot claim compensation (although not erected with the consent in writing of the landlord); but a month's notice must be given prior to removal, and the landlord has the right of pre-emption, and before removal the tenant must pay all rent, and in removal he must do no avoidable damage, and if in removal he does any damage he must make that good. The Agricultural Holdings Act 1900 (s. 4) extends the 1883 Act to fixtures or buildings *acquired* by a new tenant. See also the Market Gardener's Compensation Act 1895.

The law, then, as to fixtures shortly stands thus: The

tenant may remove (1) those erected for the purposes of trade, domestic use, or ornament; and (2) agricultural fixtures as provided by the above statutes; but all such fixtures, other than agricultural fixtures, must be removed before the expiration of the term, or during such further period as the tenant holds under a right to consider himself as tenant, otherwise they become the property of the landlord, being considered as a gift in law to him. Agricultural fixtures may, under the Agricultural Holdings Act 1883, be removed before, or within a reasonable time after, the determination of the tenancy.

The personal representatives of a tenant for life or in tail are entitled, as against the remainderman or reversioner, to fixtures put up for trade (*Ward* v. *Dudley*, 57 L. T. 20) and ornament (*Leigh* v. *Taylor*, 1902, A. C. 157). A devisee gets all fixtures; and the heir seems to get all fixtures, unless the mode and intention of annexation show no intent to make them part of the freehold (*Leigh* v. *Taylor*, *sup.*). Things fastened to or connected with land or a building pass to the purchaser.

As between mortgagor and mortgagee, the rule is that fixtures pass to the mortgagee. The Bills of Sale Act 1878 (41 & 42 Vict. c. 31) enacts that a bill of sale of chattels capable of complete transfer by delivery (which has to be registered) extends to fixtures if they are separately assigned or charged, but not to fixtures when assigned together with a freehold or leasehold interest in any land or building to which they are affixed (except trade machinery). If by the same instrument any freehold or leasehold interest as aforesaid is so conveyed or assigned, then the fixtures are not to be deemed separately assigned or charged, only because assigned by separate words, or because power is given to deal with them apart from such freehold or leasehold interest. Trade machinery means (for the purposes of the Bills of Sale Acts 1878 and 1882) the machinery used in or attached to any factory or workshop (exclusive of fixed motive power, fixed power machinery, and pipes for steam, gas and water). And if a mortgage of land or a building is made which does not mention

the trade machinery, such machinery passes as incidental to the assignment of the premises, and the Bills of Sale Acts do not apply (*Re Yates, Batchelor* v. *Yates*, 38 Ch. D. 112; 57 L. J. Ch. 697; *Small* v. *National Provincial Bank of England*, 1894, 1 Ch. 686; 63 L. J. Ch. 270; *Johns* v. *Ware*, 1897, 1 Ch. 359). Practically this would now be the only way of mortgaging by one instrument premises and fixtures in the nature of trade machinery, for it has been decided that a bill of sale to secure the payment of money which expressly includes other property not within the Bills of Sale Acts is void as a bill of sale (*Cochrane* v. *Entwistle*, 25 Q. B. D. 116; 59 L. J. Q. B. 418). If a fixture (*e.g.*, a gas engine) is affixed to the premises *before* (*Hobson* v. *Gorringe*, 66 L. J. Ch. 111) or *after* (*Reynolds* v. *Ashby*, 1903, 72 L. J. K. B. 51) the mortgage under a hire purchase agreement, the mortgagee on taking

can prevent the vendor removing it, but if the

of annexation show the chattel (*e.g.*, hired chairs nailed to the floor of a circus) was not annexed for permanent improvement of the premises but only for the most convenient temporary enjoyment of it as a chattel, the mortgagee claim it (*Lyon* v. *London*, *City*

Student's Journal, May 1903, p. 95).

DALBY v. INDIA AND LONDON LIFE ASSURANCE COMPANY.

(*S. L. C., Vol. II. p.* 271.)

(1854—15 *C. B.* 365.)

Decided:—(1) That the contract of life assurance is a contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life, and that it is not a mere contract of indemnity, as are policies against fire and marine risks.

(2) That the interest necessary under 14 Geo. 3, c. 48, s. 3, is an interest at the time of effecting the insurance, and not at the time of the recovery of money; therefore although at the time of recovery the interest is gone, yet if at the time of effecting the insurance the person effecting it had a proper interest, he can recover.

HEBDON v. WEST.

(1863—3 *B. & S.* 579.)

Decided:—That, where there are several policies effected with different offices, the insured can recover no more from the insurers, whether on one policy or many, than the amount of his insurable interest.

on these two Cases.—The case of *Dalby* v. *India and London Life Assurance Company* distinctly overrules that of *Godsall* v. *Boldero*, 9 East, 72 (which will be found set out in "Smith's Leading Cases," vol. ii. p. 263), where it had been, in fact, decided that life, like fire, assurance was but a contract of indemnity. The above case is one of the greatest importance, as plainly laying down the rule that if a person has an insurable interest at the time of effecting the life policy, he can afterwards recover, although his interest has gone; thus, if a creditor insures his debtor's life, although he is afterwards paid, yet he can recover from the insurance office.

It should be mentioned that the statute (14 Geo. 3, c. 48) referred to in the above case, does not extend to prevent individuals from effecting insurances upon their own lives, provided that it be done *bonâ fide*.

A wife has an insurable interest in the life of her husband, but a husband, parent, or child has no insurable interest in the life of the wife, child, or parent, unless he or she has some interest in property dependent on such life. By the Married Women's Property Act 1882 (45 & 46 Vict. c. 75, s. 11), a married woman may effect a policy of insurance upon her own life, or the life of her husband, for her separate use; and a policy of insurance by a married man on his own life, if so expressed on its face, may enure as a trust for the benefit of his wife and children, or any of them, and as a trust not be subject to the control of the husband or his creditors. But if the policy was effected for the purpose of defrauding creditors, they are entitled to receive out of the sum assured an amount equal to the premiums paid.

Perfect good faith is necessary in effecting a policy of insurance, and any fraud, misrepresentation, or even non-communication of material circumstances, by the party insuring, or his agents, will render the policy void. The maxim *caveat emptor* has here no application, the contract being said to be *uberrimæ fidei*. It has been held that when an insurance company on a certain state of facts offers to issue a policy of insurance, and then any fresh material circumstances occur

before the granting of the policy, they must be disclosed, and the insurance company has the right by reason of such new circumstances to refuse to grant a policy which they have previously offered to grant (*Canning* v. *Farquhar*, 16 Q. B. D. 727; 55 L. J. Q. B. 225).

On the subject of marine insurance generally, and what is recoverable under special circumstances on such a policy, the student is referred to the case of *Aitcheson* v. *Lohre* (49 L. J. Q. B. 123; 4 App. Cas. 755).

On the subject of fire insurance, *Rayner* v. *Preston* (18 Ch. D. 1; 50 L. J. Ch. 472) is of considerable importance. In that case there was a contract for the sale of a house which had been insured by the vendor against fire. After the date of the contract, but before the date fixed for completion, the house was burnt, and the vendor received the insurance money from the office. The contract contained no reference to the insurance. It was held that the purchaser was not entitled as against the vendor to the benefit of the insurance, either by way of abatement of the purchase-money or re-instatement of the premises. Arising out of this case may also be mentioned the decision in *Castellain* v. *Preston* (11 Q. B. D. 380; 52 L. J. Q. B. 366), to the effect that the insurance company having paid over the money to the insurer, not knowing he had sold the house, they could, on discovering that fact, recover it back again after the purchaser has paid his purchase-money, or if the purchase-money has not been paid may sue the purchaser

v. *Thompson*, 3 App. Cas. 279).

GEORGE v. CLAGETT.

(*S. L. C., Vol. II. p.* 138.)

(1797—*7 T. R.* 359.)

Decided :—That if a factor sells goods as his own, the buyer does not know of any principal other than the factor, and the principal afterwards declares himself, and demands payment of the price of the goods, the buyer may set off any demand he may have on the factor, against the demand made by the principal.

—In order to constitute a valid defence within the rule in this case, all that is necessary to be shown is that the contract was made by a person whom the plaintiff had entrusted with the possession of goods, that that person sold them as his own goods, in his own name, as principal with the authority of the plaintiff, that defendant dealt with him as, and believed him to be, the principal in the transaction, and that before the defendant was undeceived in that respect the set-off accrued. However, the rule only applies fully where the party contracting has not the means of knowing that the party with whom he contracts is but an agent. If he have the means of knowing, and though he may not be expressly told, he must be supposed to have known, that he was dealing, not with a principal, but with an agent, and then the reason for the rule ceases, and *cessante ratione, cessat lex* (2 S. L. C. 141).

It has been decided, somewhat extending the rule in the above case, but yet keeping strictly within its principle, that though the buyer knew at the time of buying of the person being a factor, yet he is entitled to this benefit of set-off if he

honestly believed that the factor was entitled to sell, and was selling, to repay himself advances made for his principal (*Warner* v. *McKay*, 1 M. & W. 595).

It may be well to note here the powers of factors over goods entrusted to their possession. At common law the mere position of principal and factor confers a power to sell at such times and prices as the factor may in his discretion think best, but does not confer any power to pledge. This was considered by the mercantile community an undue restriction of commerce, and in consequence certain statutes were passed, but these have now been repealed by the Factors Act 1889 (52 & 53 Vict. c. 45), which contains general provisions on the whole subject of factors. This statute provides (sects. 2, 3, 5) that where "a mercantile agent" (see *Hastings* v. *Pearson*, 1893, 1 Q. B. 62)—which expression includes a factor—is, with the owner's consent, then or originally, in possession of goods or "documents of title" thereto, any sale, pledge, or other disposition thereof made by him when acting in the course of his business, shall be valid if the person takes *bonâ fide* and without notice of any want of authority. If, however, a mercantile agent pledges in respect of an antecedent debt or liability due from him to the pledgee, then the pledgee is to acquire no further right to the goods than the pledgor had at the time of the pledge (sect. 4).

The Factors Act 1889 (sects. 8, 9), and the Sale of Goods Act 1893 (sect. 25), also contain important provisions as regards disposition by buyers or sellers of goods who have possession of the goods or documents of title thereto, the general effect being that the possession of the goods or of the documents of title thereto, enables any person to confer a good title on a person taking *bona fide* (see hereon *Cahn* v. *Pockett*, 1899, 1 Q. B. 643; 68 L. J. Q. B. 501). This subject should be specially considered in connection with the position of persons who have acquired goods under hire-purchase agreements, as to which see *Lee* v. *Butler*, 1893, 2 Q. B. 318; 62 L. J. Q. B. 391; and *Helby* v. *Matthews*, 1895, A. C. 471; 64 L. J. 465.

ADDISON v. GANDESEQUI.

(*S. L. C., Vol. II. p.* 372.)

(1812—4 *Taunt.* 574.)

In this case the defendant, being abroad and desirous of purchasing certain goods, came to England and went to his agents, L. & Co. These agents purchased the goods for him from the plaintiffs, he selecting them, and the plaintiffs debited the agents, L. & Co., with the price.

Decided :—That the plaintiffs could not now recover the price against defendant, having known who the principal was, and yet debited the agents.

PATERSON v. GANDESEQUI.

(*S. L. C., Vol. II. p.* 365)

(1812—15 *East*, 62.)

The facts in this case were of a similar nature to those of the previous one, and on the trial the plaintiff had been nonsuited. A rule *nisi* was afterwards obtained to set aside the nonsuit, and on argument it was made absolute, the Court considering that there was some doubt whether or not the plaintiff knew of the defendant being the principal. But the following general principles were laid down, agreeing with the previous case :—That if the seller of

goods, knowing at the time that the buyer, though dealing with him in his own name, is in truth the agent of another, elect to give the credit to such agent, he cannot afterwards recover the value against the *known* principal; but if the principal be not known at the time of the purchase made by the agent, it seems that, when discovered, the principal or the agent may be sued, at the election of the seller; unless where, by the usage of trade, the credit is understood to be confined to the agent so dealing, as particularly in the case of principals residing abroad.

THOMSON v. DAVENPORT.

(*S. L. C., Vol. II. p.* 379.)

(1829 9 *B. & C.* 78.)

Here, Davenport sold goods to one M'Kune, who told him he was buying them on account of another person, *but did not mention the principal's name*, and Davenport did not inquire for it, but debited M'Kune. M'Kune failed, and Davenport sued Thomson, who was the principal, for the price. The verdict was given for the plaintiffs, and was now affirmed on writ of error, it being *decided*:—That the seller might sue the principal for the price, he not having known who the principal was at the time.

on these three Cases.—The above are the leading cases on the subject of principal and agent, and are usually cited

together as being very closely connected, and jointly bearing on the point. The case of *George* v. *Clagett* (*ante*, p. 108) is sometimes confused with these three cases, and for easy reference and consideration with them, it is here placed immediately preceding them. That was a case where the *owner of the goods* employed an agent to *sell* them, and afterwards declared himself: but these three cases are where goods were *purchased* by an agent, and the point is, who is liable for the price.

An agent generally does not incur a personal liability, but it may be well to enumerate those cases in which, contrary to the general rule, he does so. They are as follows: —

1. Where, as shown in the above cases, the principal is concealed.
2. Where he acts without authority.
3. Where he exceeds his authority.
4. Where he specially pledges his own credit.
5. Where though contracting as agent, he uses words to bind himself, *e.g.*, if he covenants personally for himself and his heirs.

As regards the cases above mentioned and numbered 2 and 3—if the agent honestly believed he had authority which he did not possess, he may be sued upon a warranty of authority (*Richardson* v. *Williamson*, L. R. 6 Q. B. 276; *Collen* v. *Wright*, 8 E. & B. 647; *Starkey* v. *Bank of England*, *Law Student's Journal*, May 1903, p. 74); and if he knew that he had not the authority which he assumed to possess, he may be sued in an action of deceit (*Polhill* v. *Walter*, 1 B. & Ad. 114). It should be observed that if an agent did not know of the determination of his authority, he is not personally liable, *e.g.*, where an action was brought for necessaries supplied to a woman after her husband's death, whilst on a foreign voyage, but before she knew of his decease, it was decided that she was not liable (*Smout* v. *Ilbery*, 10 M. & W. 1). See also *Sutton* v. *New Beeston Co.*, 1900, 1 Ch. 43, where the authority of a solicitor to defend an action against a company was terminated by the company being dissolved.

Where a British agent contracts for a foreign principal

is usually personally liable; but there is no absolute rule to this effect, and it is a question of fact on the circumstances of each particular case (*Green* v. *Kopke*, 25 L. J. C. P. 297; *Armstrong* v. *Stokes*, 41 L. J. Q. B. 253; *Malcolm Flinn & Co.* v. *Hoyle*, 63 L. J. Q. B. 1).

Where a person signs a bill or note as drawer, indorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, he is not personally liable *thereon*, but the mere addition to his signature of words describing him as an agent, does not exempt him from personal liability (45 & 46 Vict. c. 61, s. 26).

An agent's authority may be determined in any of the following ways:—

1. By the principal's revocation of it, and death will operate as a revocation.
2. By the agent's renunciation with principal's consent.
3. By the principal's bankruptcy.
4. By fulfilment of the commission.
5. By expiration of time.
6. Formerly when the agent was a *feme sole*, by her marriage, but not so now since the Married Women's Property Act 1882 (45 & 46 Vict. c. 75).

In order to determine the agent's authority by revocation, means should be used to make known such revocation as fully as the employment was known. To correspondents express notice should be given, and to strangers a general notice in the *Gazette*. With regard to death of the principal operating as a revocation, note as to Powers of Attorney, the provisions of the Conveyancing Acts, 1881 and 1882 (44 & 45 Vict. c. 41, s. 47; 45 & 46 Vict. c. 39, ss. 8,

MANBY v. SCOTT.

(*S. L. C., Vol. II. p.* 450.)

(1659—1 *Sid.* 109.)

Decided:—That the wife's contract does not bind the husband unless she act by his authority.

MONTAGUE v. BENEDICT.

(*S. L. C., Vol. II. p.* 476.)

(1825—3 *B. & C.* 631.)

This was an action against a husband for certain goods—*not* necessaries—delivered to the wife of the defendant. *Decided*:—That as the goods were not necessaries, and there was no evidence to go to the jury of any assent of the defendant (the husband) to the contract made by his wife, the action could not maintained.

SEATON v. BENEDICT.

(*S. L. C., Vol. II. p.* 482.)

—5 *Bing.* 28.)

This was an action against the same defendant as in the previous case. The claim was for certain goods

which were in the nature of necessaries—delivered to the wife of the defendant. It was, however, shown that the defendant had supplied his wife's wardrobe well with all necessary articles. *Decided*:—That a husband who supplies his wife with necessaries in accordance with her station, is not liable for debts contracted by her without his previous authority or subsequent sanction.

on these three Cases.—*Manby* v. *Scott* is a very old case which occurred in the reign of Charles II., and seems to be cited in "Smith's Leading Cases," in some degree, as a specimen of "that laborious process of investigation to which important questions of law were anciently submitted." The general principle established in that case is still good law; but it must be remembered that, with regard to necessaries supplied to the wife, it may not be essential to show any specific authority of the husband to charge him, for the wife from her position has an implied authority for that purpose unless the contrary appears; and in *Seaton* v. *Benedict* the contrary did appear, for the wife was sufficiently supplied with necessaries. It was also laid down in *Manby* v. *Scott*, *Debenham* v. *Mellon infra*, and *Morel* v. *Westmoreland*, 1903, 1 K. B. 64, that the husband is not liable for necessaries if he supplies the wife with sufficient means to buy them without pledging his credit.

It was decided in *Jolly* v. *Rees* (1863, 15 C. B. (N. S.) 628), that any agreement between husband and wife that she is not to pledge his credit, or the fact of the husband forbidding the wife to pledge his credit, though not communicated to tradesmen, will be a bar to any action against the husband. This decision was thoroughly confirmed in 1881 in *Debenham* v. *Mellon* (6 App. Cas. 24; 50 L. J. Q. B. 155), which decides that where husband and wife live together, and the husband has privately forbidden his wife to buy goods on credit, he is not liable for the price of articles of dress, although suitable

to her rank in life, supplied to her by a tradesman with whom she has not dealt before, but to whom the fact that she was so forbidden has not been communicated.

It must be carefully borne in mind that *Jolly* v. *Rees* and *Debenham* v. *Mellon* only show that the presumption of the wife being the husband's general agent for necessaries may be rebutted; but where there is more than presumption, *i.e.*, if she has actually been constituted general agent by allowing her to contract, then the principle of these decisions does not apply, and to prevent the husband being liable it is necessary for him to show that he has communicated his prohibition to the tradesman.

It should be mentioned, that if a man takes a woman to his house and lives with her as his wife, she stands in the same position with regard to her power to charge him as if she were actually married to him (*Ryan* v. *Sams*, 12 Q. B. 460).

The contract of the wife does not bind the husband if the tradesman, knowing of the marriage, gives credit exclusively to the wife (*Jewsbury* v. *Newbold*, 26 L. J. Ex. 217). The mere fact that household necessaries are supplied on the wife's order to the common home raises no presumption that husband and wife are jointly liable; and if the tradesman gets a judgment against the wife, he cannot sue the husband as he has elected to look to her alone (*Morel* v. *Westmoreland*, 1903, 1 K. B. 64; 72 L. J. K. B. 66).

The whole power which a wife has to bind her husband for necessaries arises from the fact that during cohabitation there is a *presumption* arising from the very circumstances of the cohabitation, of the husband's assent to contracts made by his wife for necessaries suitable to his degree and estate, which presumption is, however, as the cases of *Seaton* v. *Benedict*, *Jolly* v. *Rees*, and *Debenham* v. *Mellon* show, liable to be rebutted. But where the wife is living apart from the husband there is *no* presumption that she has any authority to bind him, and it must be shown that from the circumstances of the

or the conduct of the husband, she has such

authority. When the husband and wife are living separate the law as to the husband's liability is as follows:—

Firstly: Where the husband unjustly expels his wife from the marital roof, or forces her to abandon it by his cruelty, she goes forth with an implied authority to bind him for necessaries.

Secondly: Where the wife unlawfully and against the husband's consent leaves him, as if she elopes and lives in adultery, she has no implied authority to bind him.

Thirdly: Where the separation is by mutual consent, the wife has an implied authority to bind her husband for necessaries, unless there is some express agreement between the husband and wife on the subject of the separation and the rights of the wife (see *Eastland* v. *Burchell*, 3 Q. B. D. 432; 47 L. J. Q. B. 500). In this third position it may be noticed that if under the agreement of separation a certain allowance is to be paid which allowance is not kept up, the wife may bind her husband by contracting to the extent of it (*Nurse* v. *Craig*, 2 N. R. 148).

With reference to the husband's liability for the debts of his wife contracted before marriage, formerly he was always so liable, but by the Married Women's Property Act 1870 (33 & 34 Vict. c. 93, s. 12), where the marriage was on or since August 9, 1870, he was relieved from liability. An amending Act (37 & 38 Vict. c. 50), however, as regards marriages on or since July 30, 1874, renewed his liability, but only to the extent of any assets he had with his wife, and it enacted that the husband and wife must be sued together, a provision which gave rise to some injustice, as shown by *Bell* v. *Stocker* (10 Q. B. D. 129; 52 L. J. Q. B. 49). These two Acts have now been repealed by the Married Women's Property Act 1882 (45 & 46 Vict. c. 75), except as regards the rights and liabilities of persons married before January 1, 1883. Under the 1882 Act (sects. 13, 14, 15), the husband is only liable to the extent of assets he has with his wife, and they may be sued together or separately. The liability of the husband under this Act is quite different to his liability at Common Law, for it is not a joint liability of the husband and wife, and therefore he cannot

require her to be joined in the action. Further, if the wife is first sued, and judgment is obtained against her, and such judgment remains unsatisfied, an action may be maintained against the husband who received assets with his wife (*Beck* v. *Pierce*, 23 Q. B. D. 316; 58 L. J. Q. B. 516).

As regards debts created by a married woman which do not bind her husband, but are her own proper debts, she is liable, but only to the extent of her separate estate, and under the Married Women's Property Act 1882 (45 & 46 Vict. c. 75, s. 1 (4)), not only is separate estate which she is possessed of at the time liable, but also subsequently acquired separate estate. However, it was held under this provision that the plaintiff had to prove that at the time of contracting the debt she possessed some separate estate (*Palliser* v. *Gurney*, 19 Q. B. D. 519; 56 L. J. Q. B. 546); but this is so no longer, by reason of the Married Women's Property Act 1893 (56 & 57 Vict. c. 63, s. 1). This 1893 Act provides that if a married woman makes any contract (otherwise than as agent) after December 5, 1893, it shall be deemed to bind her separate property whether she has any or not at the date of the contract, and shall bind all separate property which she has at the date of the contract or afterwards possesses, and can be enforced against property she afterwards owns when discovert; but no liability arising out of such contract can be enforced against property which, at the date of the contract or at any subsequent date, she is restrained from anticipating. See as to the effect of this proviso, *Barnett* v. *Howard*, 1900, 69 L. J. Q. B. 955. The whole liability of a married woman is, in fact, not a personal one, but is a liability as regards her separate estate only, so that she cannot be committed to prison under the Debtors Act 1869, as having means to pay (*Scott* v. *Morley*, 20 Q. B. D. 120; 57 L. J. Q. B. 43). The proper course for a judgment creditor to take is to seize her separate property in execution, *e.g.*, by getting a receiver appointed, and though her property, which she is restrained from anticipating, cannot then be seized, it has recently been held that any income of such property actually due to her at the date

of the judgment can be seized (*Hood Barrs* v. *Heriot*, 1896, 65 L. J. Q. B. 352; *Whiteley* v. *Edwards*, *ibid.* 457).

It was decided that a married woman cannot be made a bankrupt in respect of a debt for which she is liable, even though she has a separate estate (*Ex parte Jones*, *In re Grissell*, 12 Ch. D. 484; 48 L. J. Bk. 109); but now, by the Married Women's Property Act 1882 (sect. 1), if a married woman is carrying on a trade apart from her husband, she shall, in respect of her separate property, be liable to the bankrupt laws. She cannot, however, be served with a bankruptcy notice under a judgment obtained against her for a debt contracted during coverture (*Re Lynes*, 1893, 1 Q. B. 113; 62 L. J. Q. B. 372). A power of appointment not being "property," a married woman who is a bankrupt, cannot be compelled to exercise such a power for the benefit of her creditors (*Ex parte Gilchrist*, *Re Armstrong*, 17 Q. B. D. 521; 55 L. J. Q. 578). But where a restraint on anticipation ceases during her bankruptcy by the husband's death, the trustee in bankruptcy can then claim the property (*Re Wheeler*, 1899, L. J. Ch. 663).

PRICE v. EARL OF TORRINGTON.

(*S. L. C., Vol. II. p.* 320.)

This was an action for the price of beer sold and delivered, and the evidence given to charge defendant was, that the drayman, in the usual course of business, and in discharge of his duty, had made a note of the delivery of the beer, and set his hand thereto, and that he had since died. *Decided*:—That this was good evidence of a delivery.

HIGHAM v. RIDGWAY.

(*S. L. C., Vol. II. p.* 327.)

(1808—10 *East*, 109)

In this case it was necessary to prove the precise date of the birth of one William Fowden, and to prove this, an entry made by a man-midwife (since dead), who had delivered the mother, of his having done so on a certain day, referring to his ledger, in which he had made a charge for his attendance, *which was marked as paid*, was tendered. *Decided*:—That this was good evidence.

Notes on these two Cases.—These two cases on evidence are sometimes confused by students. The grounds of the

are, however, quite distinct; that of *Price* v. *Earl of Torrington* being, that the entry was made in the ordinary course of business, and in the performance of duty (and here it must be observed, that in this class of cases only so much of the entry as it was strictly the duty of the party to make can be received); whilst the ground of the decision in *Higham* v. *Ridgway* was, that the entry was against the interest of the party who had made it (and in this class of cases the other facts stated in the entry, though not against the interest of the party making the entry, can be received). Had this not been so, the entry given in evidence in *Higham* v. *Ridgway* would have been inadmissible. The distinction is most important, and should be well observed. Where a declaration or entry against interest is also the only evidence of the existence of the interest against which it tends, it was formerly considered that it was not admissible, but the law must now be taken to be that where an entry is *primâ facie* a clear entry against interest, it is always admissible in evidence for what it is worth (*Taylor* v. *Witham*, 3 Ch. D. 605; 45 L. J. Ch. 798).

These two classes of cases come properly under the heading of Hearsay Evidence, which may be defined as some "oral or written statement of a person who is not produced in Court, conveyed to the Court either by a witness or by the instrumentality of a document." (Powell on Evidence, 7th ed., p. 132.) The general rule as to hearsay evidence is that it is not admissible. The foregoing cases show two exceptions to this rule, and in addition to these, other cases in which the statements of persons not upon oath are admissible in evidence are, that in respect of matters of public or general interest, declarations of deceased persons who may be presumed to have had competent knowledge on the subject, are admitted if made before any controversy arose; also matters of pedigree may be proved by declarations of deceased persons connected by blood or marriage with the family, if made before any controversy arose, or by the general reputation of a family. It is also provided that on an interlocutory application, affidavits may contain statements founded only on the deponents' belief,

if the grounds for such belief are stated. (Order XXXVIII., r. 3.)

Formerly all witnesses were obliged to take an oath, and the case of *Omichund* v. *Barker* (Willes, 550), as modified by later cases, decided that to entitle a witness to take an oath, it was necessary that he should believe in the existence of a God who would punish him in a future world. By the Oaths Act 1888 (51 & 52 Vict. c. 46, which repeals the previous provision of 32 & 33 Vict. c. 68, s. 4), it is provided that every person who objects to be sworn, on the ground that he has no religious belief or that the taking of an oath is contrary to his religious belief, may make a solemn affirmation instead of taking an oath, in all places and for all purposes where an oath is or shall be required by law, and that if such person shall wilfully, falsely, and corruptly affirm anything which if on oath would amount to perjury, he shall be liable to prosecution as if he had committed perjury. If a witness is desirous of making an affirmation instead of taking an oath, it is the duty of the Judge presiding at the trial to himself examine the witness and ascertain that he objects to being sworn, on the ground either that he has no religious belief, or that the taking of an oath is contrary to his religious belief (*Reg.* v. *Moore*, 61 L. J. M. C. 80; 66 L. T. 125).

At Common Law criminals and interested persons were not good witnesses, but this rule has been gradually relaxed, and it may be useful to give a short statement of the various statutory enactments on the subject.

6 & 7 *Vict. c.* 85.—No person offered as a witness shall be hereafter excluded from giving evidence by reason of incapacity from crime or interest.

14 & 15 *Vict. c.* 96.—Parties to actions and suits, and the persons on whose behalf the same are brought and defended, shall (with certain exceptions) be competent and compellable to give evidence; but this is not to render a party charged with a criminal offence, able to give evidence for or against himself.

16 & 17 *Vict. c.* 83.—Husbands and wives are to be competent and compellable witnesses, except in criminal cases; but

husband or wife not compelled to disclose any communication made during marriage.

32 & 33 Vict. c. 68.—Parties in breach of promise cases and adultery proceedings are competent witnesses; but in adultery proceedings parties are not bound to confess the adultery unless they have given evidence in disproof of adultery, and in breach of promise cases the evidence of the plaintiff must be corroborated by some material evidence in support of the promise.

(See further as to evidence generally, Indermaur's "Principles of Common Law," Part III., Ch. 2.)

ROE v. TRANMARR.

(*S. L. C., Vol. II. p.* 506.)

(1757—*Willes*, 682.)

Decided :—That a deed which could not operate as a release, as it attempted to convey a freehold *in futuro*, should nevertheless operate as a covenant to stand seised.

—The principle which this case carries out is one of great importance, forming, indeed, one of the first rules of construction of all written instruments, viz., "The construction shall be liberal; words ought to serve the intention, not contrarywise."

It appears convenient here to give some of the chief rules for the construction of deeds :—

1. A deed is to be expounded according to the intention, where that intention is clear, rather than according to the precise words used, for "*verba intentioni debent inservire*," and "*qui hæret in literâ, hæret in cortice.*"

2. To explain an ambiguity apparent on the face of a deed, no evidence *dehors* the deed itself is admissible.

3. The construction of a deed should be made upon the entire instrument, and so as to give effect, as far as possible, to every word that it contains.

4. The construction should be favourable, and such that "*res magis valeat quam pereat.*"

5. When anything is granted, the means necessary for its enjoyment are also granted by implication; for it is a maxim that "*cuicunque aliquid conceditur, conceditur et id sine quo res ipsa non esse potuit.*"

6. If there be two clauses in a deed so totally repugnant to

each other that they cannot stand together, the first shall be received and the latter rejected.

7. Ambiguous words shall be taken most strongly against the grantor, and in favour of the grantee. "*Verba fortius accipiuntur contra proferentem.*" But this being a rule of some strictness and rigour, is the last to be resorted to, and is never to be relied upon but when all other rules of exposition fail; and it does not apply to a grant by the Crown at the suit of the grantee.

The student, desiring full and detailed information on the subject of interpretation of deeds generally, is referred to Elphinstone, Norton, and Clark's "Rules for the Interpretation of Deeds."

VICARS v. WILCOCKS.

(*S. L. C., Vol. II. p.* 521.)

(1806—8 *East*, 1.)

In this case it appeared that the plaintiff had been retained by J. O. as a journeyman, and that the defendant had, in discourses with third persons, imputed to the plaintiff that he had maliciously cut the defendant's cordage in his rope-yard, and that in consequence of such imputation the said J. O. had discharged plaintiff from his service, and he had thus been much injured.

Decided :—That damage to be actionable, must not be too remote; and that where special damage is necessary to sustain an action for slander, it is *not* sufficient to prove a mere wrongful act of a third person induced by the slander, such as that he dismissed the plaintiff from his employ before the end of the term for which they had contracted; but the special damage must be a legal and natural consequence of the slander.

HADLEY v. BAXENDALE.

(1854—9 *Ex* 341.)

This was an action of assumpsit brought against the defendants as common carriers. The plaintiffs, the

owners of a mill, finding one of the shafts broken, sent to defendants' office a servant, who informed the clerk there, that the mill was stopped, and that the shaft must be sent at once, and the clerk informing him that if sent any day before twelve o'clock it would be delivered the following day, the shaft was sent and the carriage paid. The neglect arose in the non-delivery in sufficient time, whereby the making of a new shaft was delayed several days. Evidence was given of the loss of profits caused by the stoppage of the mill, which was objected to by the defendants as being too remote. *Decided*:—That the loss of the profits could not be taken into account in estimating the damages; and that the damages in respect of breach of contract should be such as might fairly and reasonably be considered either arising naturally, or such as might reasonably have been supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

Notes on these Cases.—The rule laid down in *Vicars* v. *Wilcocks* that the *wrongful* act of a third party, even though the natural and probable result of the defendant's act, could never be taken into account in assessing damages, or in other words that damages must be the natural *and legal* consequence of the defendant's act, was manifestly unjust *and is not now law*, (*Lynch* v. *Knight*, 9 H. L. Ca. 577; *Lumley* v. *Gye*, 22 L. J. Q. B. 463). The two cases however both deal generally with the question of the proper measure of damages, and the subject being of very great importance a few observations on it may be found useful.

Firstly. *In actions of contract.* The rule in

damages here is much more strictly confined than in actions of tort, and generally the primary and immediate result of the breach of contract only can be looked to; thus, in the case of non-payment of money, no matter what amount of inconvenience is sustained by the plaintiff, the measure of damages is the interest of the money only. The principle seems to be in these cases that in matters of contract the damages to which a party is liable for its breach ought to be in proportion to the benefit he is to receive from its performance. Mr. Mayne, in his "Treatise on Damages," 6th ed. (p. 11), says: "It is obviously unfair that either party should be paid for carrying out his bargain on one estimate of its value, and forced to pay for failing in it on quite a different estimate. This would be making him an insurer of the other party's profits without any premium for undertaking the risk."

Now, as to the grounds of damage which will in no case be admissible, they may be classed under the general head of remoteness. "Damage," says Mr. Mayne (p. 47), "is said to be remote when, although arising out of the cause of action, it does not so immediately and necessarily flow from it as that the offending party can be made responsible for it." And it is here that the case of *Hadley* v. *Baxendale* (which is one intended to settle the law upon the subject, and which has since been acted upon), comes in, laying down the rule as given above in that case, and which rule was shortly stated by Blackburn, J., in *Cory* v. *Thames Iron Works Co.* (L. R. 3 Q. B. 186), thus: "The damages are to be what would be the natural consequences of a breach under circumstances which both parties were aware of." If the damages are not within this rule, then they are too remote and cannot be recovered. There is, however, no doubt very often considerable difficulty in determining whether, when there are any special circumstances in a case, such special circumstances can or cannot be taken into account in arriving at the amount of the damages. The correct rule appears to be that where there are any circumstances connected with a contract which may cause special damage to follow if it is broken, mere notice of

special circumstances given to one party will not render him liable for the special damage unless it can be inferred from the whole transaction that he consented to become liable for such special damage, and that if the person has an option to refuse to enter into the contract but still enters into it, this will be evidence that he accepted the additional risk in case of breach. (Mayne on Damages, 41.) It will be noticed that, in the case of *Hadley* v. *Baxendale*, though the defendants had notice of special circumstances, yet they had no option to decline to enter into the contract, for they were common carriers.

A useful illustration of the additional damages that can be recovered by reason of notice of special circumstances, is found in the case of *Grébert-Borgnis* v. *Nugent* (15 Q. B. D. 85; 54 L. J. Q. B. 511). There the defendants contracted with the plaintiff to deliver goods to him, of a particular shape and description, at certain prices, and by instalments at different times. When the contract was made, the defendants knew that, except as to price, it corresponded with and was substantially the same as a contract which the plaintiff had entered into with a French customer of his, and that it was made in order to enable the plaintiff to fulfil such last-mentioned contract. The defendants broke their contract, and there being no market for goods of the description contracted for, the plaintiff's customer recovered damages against him in the French Court to the amount of £28. It was held that the plaintiff was entitled to recover as damages the amount of profits he would have made had he been able to fulfil his contract with his customer, and also the £28 and costs. See also *Hammond* v. *Bussey*, 20 Q. B. D. 79, and *Agius* v. *G. W. Colliery*, 1899, 68 L. J. Q. B. 312.

As to the damages recoverable by a purchaser for breach of a contract to sell land, see *Bain* v. *Fothergill* (L. R. 7 H. L. 158), *Day* v. *Singleton* (1899, 68 L. J. Ch. 593) and Indermaur's "Conveyancing," 335, 336.

Secondly. *In actions of tort.* The rule here as to damages is of a very much looser character than in actions of contract, and this is naturally so from the nature of the case. With

the one exception of actions for breach of promise of marriage, the motives or conduct of a party breaking a contract, or any injurious circumstance not flowing from the breach itself, cannot be considered as damages where the action is on the contract. But torts may be mingled with ingredients which will much increase the damages; thus a trespass may be attended with circumstances of insult, and generally, in an action of tort any species of aggravation will give ground for additional damages. Still it must be remembered that even in actions of tort, only such damages can be awarded as might reasonably be expected to ensue from the wrongful act, in other words that here also the damages claimed must not be too remote. (*Kelly* v. *Partington*, 5 B. & A. 645; *Sharp* v. *Powell*, L. R. 7 C. P. 253; 41 L. J. C. P. 95). However, in some cases of tort, the jury are justified in giving damages quite beyond any possible injury sustained by the plaintiff, on the ground that the action is brought to a certain extent as a public example, and damages when so awarded are styled exemplary or vindictive damages. Thus, note an action of seduction as an instance.

As to the time to which any damages, whether in contract or tort, may be assessed, of course no damages can be given on account of anything before the cause of action arose, and as to damages subsequent to the cause of action, the result of the decisions is stated by Mr. Mayne (p. 106) to be, that such damages "may be taken into consideration where they are the natural and necessary result of the act complained of, and where they do not themselves constitute a new cause of action." A plaintiff is, under the present practice, entitled to have damages assessed not merely up to the date of the issuing of the writ, but up to the time of the trial (Order XXXVI., r. 58).

For further information on the subject of Damages the student is referred to Mr. Mayne's "Treatise on Damages," from which work the above notes are mainly gathered. (See also hereon Indermaur's "Principles of the Common Law," 9th ed., Part III., Ch. 1.)

NEPEAN v. DOE.

(*S. L. C., Vol. II. p.* 558.)

(1837—2 *M. & W.* 894.)

Decided :—That where a person goes abroad and is not heard of for seven years the law presumes the fact that such person is dead, but *not* that he died at the beginning or the end of any particular period during those seven years.

Notes.—Of course, this presumption of law is liable to be rebutted, and though there is no presumption of law as to the period of death, such a presumption may arise from particular circumstances ; but this is matter of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential. There is also no presumption of law in favour of the continuance of life, though an inference of fact may legitimately be drawn that a person alive and in health on a certain day was alive a short time afterwards (*In re Phené*, L. R. 5 Ch. 139 ; see also *Hickman* v. *Upsall*, 4 Ch. D. 144 ; 46 L. J. Ch. 245).

Where a person has not been heard of for seven years, and during that period—that is, before the expiration of the seven years—a gift is made to him *by a deed*, he must, until the contrary is shown, be taken to have been in existence at the date of the gift, and if the contrary cannot be shown, there is no failure of the gift, but it will go to his representatives (*In re Corbishley's Trusts*, 14 Ch. D. 846 ; 49 L. J. Ch. 266). But if the gift be made *by will*, the gift fails unless it can be proved affirmatively that the devisee or legatee did survive the testator (*Re Phené*, *Re Corbishley*,

There is no presumption of law arising from difference of age or sex, as to survivorship when the death of several persons is occasioned by the same cause; nor is there any presumption of law that all died at the same time. The question is entirely one of fact depending on the evidence, and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined, the *onus probandi* being on the person setting up a survivorship (*Wing* v. *Angrave*, 8 H. L. C. 183).

HOCHSTER v. DE LA TOUR.

(1853—2 *Ell. & Bl.* 678.)

Here there was an agreement to employ the plaintiff as a courier from a day *subsequent* to the date of the writ, and before the time for the commencement of the employment defendant had refused to perform the agreement, and had discharged the plaintiff from performing it, whereupon he had brought this action. *Decided*:—That a party to an agreement may, before the time for executing it, break the agreement, either by disabling himself from fulfilling it or by renouncing the contract, and that an action will lie for such breach before the time for fulfilment of the agreement.

FROST v. KNIGHT.

(1872—*L. R.* 7 *Ex.* 111; 41 L. J. Ex. 78.)

In this case the defendant had promised to marry the plaintiff on the death of his father; and he had afterwards, during his father's life, announced his absolute determination never to fulfil his promise.

Decided:—That the plaintiff might at once regard

the contract as broken, in all its obligations and consequences, and sue thereon.

Notes on these two Cases.—The principle decided in v. *De la Tour* seems to be one of reason, for when a man i bound to do some act at a future day, and before that day definitely declares he will not do it, and refuses to do it, or puts himself in such a position that he cannot do it (*Synge* v. *Synge*, 1894, 63 L. J. Q. B. 202), there seems no reason why the cause of action should be delayed until the arrival of that future day. This principle has been recognised and acted on in the case of *Frost* v. *Knight*, given above, overruling the decision of the Court below, which will be found reported in Law Rep. 5 Ex. 322.

But when a person is guilty of an anticipatory breach, the other party must make up his mind whether he will take advantage of it or not, for when he does not take advantage of the rescission, the contract still remains in fact in existence (*Avery* v. *Bowden*, 5 El. & Bl. 714; *Johnstone* v. *Milling*, 16 Q. B. D. 460; 55 L. J. Q. B. 162; and see Indermaur's "Principles of the Common Law," 9th edit. 260) If there is a contract containing several stipulations, *e.g.*, a lease with various covenants, the doctrine of *Hochster* v. *De la Tour* does not apply so as to enable a party to sue in respect of the anticipatory breach of one stipulation; in fact, it seems that the principle does not apply to any case where, upon a refusal by one party to perform a particular stipulation, the other cannot put an end to the contract in its entirety (*Johnstone* v. *Milling*, *supra*).

As regards a contract to deliver goods by instalments, or to pay for goods by instalments, the Sale of Goods Act 1893 provides as follows:—"Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more i

it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of the contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated" (56 & 57 Vict. c. 71, s. 31). See *Mersey Steel and Iron Co.* v. *Naylor*, 1884, 53 L. J. Q. B. 497.

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